Mr. Smith was carefully cross-examined about his knowledge of the functions and uses of asbestos-containing insulation products. It was the standard of the industry to use asbestos-containing insulation.[4] (*Id.* at p. 39/3-17). People buy insulation with the hope that it will be a permanent and fixed installation.[5] (*Id.* at p. 38/14-24). While describing the general function of an insulator's job, Mr. Smith says "the idea is to get [insulation] sealed to the point where the insulation prevents the loss of heat and energy." (*Id.* at p. 124/18-21). Based on Mr. Smith's experience and observation and what he learned through training, experience, and observation, he opined that "[asbestos-containing insulation] was used because it was found to be effective, and it was probably easier maybe to use than some other type of insulation."[6] (*Id.* at p. 39/3-14). He agrees it was the industry standard because it was "the best."[7] (*Id.* at pp. 39/22-40/6). He also agrees that the insulation at DuPont-Chattanooga became a part of the factory after it was installed.[8] (*Id.* at pp. 44/20-45/1).

E. Deposition of Sally Webbe

The deposition of Sally Webbe was taken on March 27, 2002 in Lexington, Blackacre. This testimony is not relevant to the issues before the Court at summary judgment.

[4] Plaintiff objected to the question as calling for speculation. This objection should be overruled because Pete answered the question based on his "experience and observation and what [he] learned through training, experience, and observation." (*Id.* at 39/3-17). *See* Bl. R. Evid. 602.
[5] Plaintiff objected to the question as asking for a legal conclusion. (*Id.* at p. 38/14-18). This objection should be overruled because Pete's experience and observation as an insulator's helper and what he learned through training, experience, and observation as an insulator's helper qualifies him to opine on whether insulation was meant to be permanent. *See* Bl. R. Evid. 602.
[6] Plaintiff's objection should be overruled for the reasons stated in footnote 4. This is the same objection discussed *supra* at footnote 4. (*Id.* at 39/3-14).
[7] Plaintiff's objection should be overruled because Plaintiff failed to state an objection with reasonably particularity. Saying "objection," without more, is not enough to preserve an objection on the record. (*Id.* at p. 39/22-24).
[8] Plaintiff's objection should be overruled because Plaintiff failed to state an objection with reasonably particularity. Saying "objection," without more, is not enough to preserve an objection on the record. (*Id.* at p. 44/20-22).

F. Miscellaneous Documents

AC&S produced four letters in response to Plaintiff's discovery requests.[9] The letters provide evidence of AC&S's very limited involvement in installing and supplying asbestos-containing insulation products at DuPont-Chattanooga. The first letter is dated August 21, 1956, and was sent from Robert Armstrong, Jr., CEO of AC&S, to Douglas Allan, Vice President of Material Procurement at DuPont-Chattanooga. This letter describes DuPont-Chattanooga's plan to hire AC&S's insulators to install Johns-Manville Thermobestos in their Number One Boiler Room. *See* Exhibit A.

The second letter is dated September 24, 1956, and was sent from Robert Armstrong, Jr., CEO of AC&S, to Douglas Allan, Vice President of Material Procurement at DuPont-Chattanooga. This letter confirms that AC&S had completed insulating the steam pipes and related equipment in the Number One Boiler Room as referenced by Exhibit A. *See* Exhibit B.

The third letter is dated June 22, 1968, and was sent from Robert Armstrong, Jr., CEO of AC&S, to Bill Webbe, Insulation Supervisor at DuPont-Chattanooga. This letter indicates that AC&S sent DuPont-Chattanooga a shipment of Johns-Manville Thermobestos after Bill Webbe reached out to AC&S about a lost shipment of Kaylo. Notably, the language about a lost shipment of Kaylo does not permit the inference that AC&S ever supplied Kaylo before this lost shipment. *See* Exhibit C.

The fourth letter is dated February 12, 1973, and was sent from Robert Armstrong, Jr., CEO of AC&S, to Bill Webbe, Insulation Supervisor at DuPont-Chattanooga. The letter states: "I cannot comply with your request for another 24 boxes of Pittsburgh Corning Unibestos." It goes

[9] AC&S assumes that Plaintiff will rely on these letters at summary judgment, and, in that case, we do not contest that these letters are admissible as opposing party statements. *See* Bl. R. Evid. 801. If Plaintiff does not so rely, however, we move the court to strike these letters from the record as inadmissible hearsay. *Id.*

on to say that asbestos-containing products are no longer available, but that there is now an asbestos-free alternative available. Notably, AC&S concedes that the language "*another 24 boxes of... Unibestos*" supports the inference of at least one previous shipment of Unibestos; however, inferring that there was more than one previous shipment from this letter would amount to pure speculation. *See* Exhibit D.

Aside from what Plaintiff received in discovery, we submit the following two letters as evidence that AC&S was in the business of supplying and/or installing non-asbestos-containing insulation, and that AC&S could have supplied and/or installed non-asbestos-containing insulation at the DuPont-Chattanooga facility. The first letter is dated April 1, 1961, and was sent from Robert Armstrong, Jr., CEO of AC&S, to Roger P. Cleary, Esq. at Cleary & Cleary. The letter indicates that AC&S "told DuPont repeatedly that cork insulation would provide superior insulation, and [AC&S] can't afford to replace that fiber glass insulation and eat the cost." *See* Exhibit E. Notably, neither cork nor fiber glass insulation products contain asbestos.

The second letter is dated March 23, 1966, and was sent from Robert Armstrong, Jr., CEO of AC&S, to Mr. John Williams, Insulation Supervisor at Reynold Metals in Tuscumbia, AL. The letter indicates that AC&S "distribute[s] a wide-range of insulation products, from asbestos-containing pipe and block insulation for high-heat application to cork, rubber, mineral wool, fiber glass, and foam glass insulation." *See* Exhibit F. Notably, cork, rubber, mineral wool, fiber glass, and foam glass insulation do not contain asbestos. AC&S submits these letters for the circumstantial, non-hearsay purpose of showing that AC&S was in the business of supplying and installing non-asbestos containing insulation at factories such as DuPont-Chattanooga, not for the truth of the matter asserted in the letters. *See* Bl. R. Evid. 801.

III. ARGUMENT AND CITATION OF AUTHORITIES[10]

A. Defendant's Burden On Summary Judgment

Upon motion for summary judgment, the Court must view the facts—and the inferences to be drawn from those facts—in the light most favorable to the party opposing the motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c) mandates entry of summary judgment against a party who "after adequate time for discovery and upon motion…fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The moving party, however, is not entitled to summary judgment if the parties' dispute over a material fact is genuine. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A genuine issue of material fact exists if a reasonable jury could return a verdict for the non-moving party. *Id.*

B. The Plaintiff Has Failed To Meet The Threshold Burden Of Demonstrating Exposure To AC&S's Product As Required Under Blackacre Law.

Under Blackacre law, the controlling case setting the standard for product identification in asbestos cases is *Blackston v. Johns-Manville Co*., 764 F.2d 1480, 1485 (4th Cir. 1985). Under *Blackston*, there exists no presumption that a plaintiff was exposed to a defendant's asbestos-containing product simply by virtue of working at a job site at a time when a defendant's asbestos-containing product was in use. *Blackston v. Johns-Manville Co.*, 764 F.2d 1480, 1485 (4th Cir. 1985). To survive summary judgment, a plaintiff must affirmatively show that a particular defendant's product caused injury to him. *Blackston v. Johns-Manville*, 764 F.2d 1480, 1485 (4th

[10] AC&S assumes *arguendo* that the *in limine* arguments raised by AC&S to exclude evidence are resolved in favor of Plaintiff for the purposes of this brief. AC&S does not waive objections and arguments raised herein.

Cir. 1985). Without such showing, summary judgment must be entered in favor of a defendant. *Blackston v. Johns-Manville Co.*, 764 F.2d 1480 (11th Cir. 1985); *Odum v. Celotex Corp.*, 764 F.2d 1486 (4th Cir. 1985); *Lee v. Celotex Corp.*, 764 F.2d 1489 (4th Cir. 1985).

i. AC&S's Role as a Supplier

In the instant case, there is no evidence that AC&S supplied asbestos-containing products to Mr. Webbes's home construction sites. Indeed, Mr. Smith testified that he never saw AC&S boxes at the home construction sites, and the asbestos-containing products he remembers seeing at the home construction sites are products that AC&S was not in the business of supplying. (Deposition of Pete Smith, March 17, 2002, pp. 43/10-44/5). Nancy's theory of exposure to asbestos-containing products supplied by AC&S therefore rests on the assumption that Mr. Webbe was exposed to asbestos-containing products that AC&S supplied to the DuPont-Chattanooga facility, and that Mr. Webbe's exposure at DuPont-Chattanooga subsequently led to Nancy's exposure through the same asbestos-containing dust on Mr. Webbe's work clothes.

The record shows that AC&S boxes were present at the DuPont-Chattanooga facility sometime between 1965 and 1970. (*Id.* at pp. 41/17-42/4). Mr. Smith asserts that the boxes contained insulation, but the record is silent as to whether the boxes contained non-asbestos-containing insulation or asbestos-containing insulation. *Id.* Moreover, the record does not indicate whether Mr. Smith ever saw the boxes opened, nor whether he ever saw products taken out of the boxes. Lastly, there is no testimony that places Mr. Webbe in proximity to products removed from the AC&S boxes. Based on these facts, Plaintiff cannot affirmatively show that Mr. Webbe was exposed to products that AC&S supplied. Even if Plaintiff could affirmatively show that Mr. Webbe was exposed to products taken from these AC&S boxes, Plaintiff cannot affirmatively show that the boxes contained asbestos-containing products.

Indeed, the record shows that AC&S was in the business of supplying and installing non-asbestos-containing insulation products at facilities such as DuPont, *see* Exhibit E; Exhibit F, and Mr. Webbe admitted that DuPont-Chattanooga regularly used non-asbestos containing products. (Deposition of Bill Webbe, January 18, 1998, p. 15/9-14). While there is evidence that AC&S supplied DuPont with a shipment of Thermobestos in 1968 and a shipment of Unibestos sometime before February 12, 1973, this falls short of affirmative evidence. *See* Exhibit C; Exhibit D. Blackacre law requires the Plaintiff to produce affirmative evidence of exposure to asbestos-containing products to survive summary judgment. *Blackston v. Johns-Manville*, 764 F.2d 1480, 1485 (11th Cir. 1985). Mr. Smith did not testify that he saw Thermobestos or Unibestos products in the AC&S boxes, nor that he saw Mr. Webbe working with or around Thermobestos or Unibestos removed from the AC&S boxes. The Thermobestos and Unibestos that we supplied could have been used at a completely different part of the facility from where Mr. Webbe was working, or they might not have been used at all.

ii. AC&S's Role as a Contractor

There is no evidence that AC&S was ever contracted to install asbestos-containing products at Mr. Webbe's home construction sites. Indeed, Mr. Smith testified that he never saw AC&S workers at the home construction sites, and the asbestos-containing products he remembers seeing at the home construction sites are products that AC&S was not in the business of installing. (Deposition of Pete Smith, March 17, 2002, pp. 43/10-44/5). Nancy's theory of exposure to asbestos-containing products installed by AC&S therefore requires the assumption that Mr. Webbe was exposed to asbestos-containing products that AC&S installed at the DuPont-Chattanooga facility, and that Mr. Webbe's exposure at DuPont-Chattanooga subsequently led to Nancy's exposure through the same asbestos-containing dust on Mr. Webbe's work clothes.

The record shows that AC&S performed, at the most, three insulation contracting jobs at the DuPont-Chattanooga facility while Mr. Webbe was working at the facility.[11] The first was performed sometime between August 21, 1956 and September 24, 1956, where AC&S installed Thermobestos in the Number One Boiler room. *See* Exhibit A; Exhibit B. Mr. Webbe was working as an insulator when this contracting job was performed. (Deposition of Bill Webbe, January 18, 1998, p. 11/4-17). Second, there is evidence that AC&S performed one contracting job in the early to mid-1960's. (*Id.* at p. 12/4-8). Mr. Webbe was working as an insulation supervisor during this job. (*Id.* at p. 11/4-17). Third, there is evidence that AC&S performed one contracting job between 1965 and 1970. (Deposition of Pete Smith, March 17, 2002, pp. 38/8-13, 121/2-8). Mr. Webbe was also working as an insulation supervisor during this job. (Deposition of Bill Webbe, January 18, 1998, p. 11/4-17).

In the first instance, there is no evidence that Mr. Webbe worked in proximity to the insulation job AC&S performed in the Number One Boiler room in 1956. On the contrary, Mr. Webbe testified that DuPont's internal insulators did not work with the external insulators when DuPont hired outside insulation contractors, and Mr. Webbe was in fact working as one of DuPont's internal insulators during this contracting job. (*Id.* at pp. 11/26-12/2, 11/4-17). Further, Nancy was not doing the family laundry at this time, which Plaintiff contends was her primary source of exposure to asbestos-containing dust from DuPont-Chattanooga. (Deposition of Nancy Costeloe, July 17, 2001, pp. 12/26-27, 14/2).

Second, there is no affirmative evidence that Mr. Webbe worked in proximity to asbestos-containing products during the contracting job AC&S performed in the early to mid-1960's. While

[11] The record is ambiguous as to whether the contracting jobs AC&S performed as identified by the deposition of Mr. Webbe and Mr. Smith were two separate occasions or the same occasion. However, in the light most favorable to Plaintiff, AC&S assumes *arguendo* that the jobs were performed on two separate occasions.

Mr. Webbe acknowledges that he sometimes checked on their work, he only saw AC&S using non-asbestos-containing insulation products such as foam glass and rubber. (*Id.* at 12/14-18, 12/24-29). He saw boxes of Johns-Manville Thermobestos in AC&S's storeroom, but he doesn't know if it was used. (*Id.* at p. 12/29-31). Once again, evidence of boxes being present, without more, falls short of affirmative evidence under Blackacre law. Mr. Webbe testified that he and the other insulators had to replace the materials that AC&S installed, yet he doesn't recall if Thermobestos was used despite having to remove the materials. (*Id.* at p. 12/19-22, 12/29-31). Furthermore, the record is vague as to when this installation job occurred, but if it occurred before 1966, then Nancy was not doing the family laundry at this time. (Deposition of Nancy Costeloe, July 17, 2001, pp. 12/26-27, 14/2).

Third, there is no affirmative evidence that Mr. Webbe worked in proximity to asbestos-containing products during the contracting job that AC&S performed between 1965 and 1970. Mr. Smith testified that, every day during this contracting job, Mr. Webbe would go over to the side of the facility that AC&S was working on to check on their work. (Deposition of Pete Smith, March 17, 2002, p. 87/7-12, 87/14-19). However, Mr. Smith worked on a different side of the facility from the AC&S contracting job, so there's no testimony indicating how close Mr. Webbe was to the AC&S workers. (*Id.* at pp. 37/17-38/2, 87/1-5). Mr. Smith also testified that he and the other insulators had to remove the insulation that AC&S installed. (*Id.* at pp. 122/10-15, 124/23-125/8). However, there is no testimony that Mr. Webbe accompanied these insulators when Mr. Smith and the other insulators had to remove the insulation that AC&S installed. Once again, the record is vague as to when this installation job occurred, but if it occurred before 1966, then Nancy was not doing the family laundry at this time. (Deposition of Nancy Costeloe, July 17, 2001, pp. 12/26-27, 14/2).

C. Assuming Proximity is Established, The Plaintiff Offers No Evidence of Frequency or Regularity of Exposure to AC&S's Asbestos-Containing Product.

Even assuming that the Court finds that the Plaintiff offered affirmative evidence that Nancy was somehow exposed to one of AC&S's asbestos-containing products, Plaintiff must prove more than just a mere minimum exposure. Because legal causation requires that a defendant's conduct be a substantial factor in causing harm, the Fourth Circuit Court of Appeals, in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), established a test to evaluate the sufficiency of the evidence of exposure. *Id.* at 1162 (applying Blackacre substantive law). This test for asbestos cases, the "frequency, regularity, and proximity" test, incorporates Blackston's proximity test, *see supra*, and looks not only to the mere inference of exposure, but to the frequency and regularity of the exposure to ensure that the defendant's conduct was a substantial factor in causing harm, i.e., the legal cause. "In effect, this is a *de minimis* rule because the plaintiff must prove more than just a casual or minimum contact with the product." *Id.*

This test was necessitated by arguments that a jury question is created if the plaintiff only presents evidence that a defendant's asbestos-containing product was at the work site at the same time the plaintiff was at the work site. *Id.* Given the tremendous size of the workplace of a typical asbestos plaintiff (*e.g.*, shipyards, manufacturing plants), and the great number of products used over time in those workplaces, the extent and nature of the exposure has to be evaluated to determine whether it is sufficient to establish proximate causation. *See Id.* Thus, to defeat summary judgment, the plaintiff must offer "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 1162-63.

i. AC&S's Role as a Supplier

Assuming *arguendo* that the Court finds that Plaintiff offered evidence that Mr. Webbe was exposed to asbestos-containing products that AC&S supplied to DuPont-Chattanooga, and that Nancy was subsequently exposed to the same asbestos-containing dust on Mr. Webbe's work clothes, there is no evidence that such exposure was more than *de minimis*. In particular, there is no testimony that Mr. Webbe worked around products removed from the AC&S boxes that Mr. Smith identified as being present at DuPont-Chattanooga sometime between 1965 and 1970. Similarly, even if these boxes contained a shipment of Thermobestos or Unibestos, there is no evidence indicating how frequently or how long Mr. Webbe would have worked around such products.

Plaintiff may urge the Court to make the inference that Mr. Webbe was exposed to these products with sufficient frequency and regularity because Mr. Smith testified that Mr. Webbe moved around the plant to watch the insulators and make sure they were doing their job. (Deposition of Pete Smith, March 17, 2002, pp. 8/21-9/11). However, such an inference strains credulity because this testimony indicates neither how frequently Mr. Webbe would have been exposed *to a particular product supplied by AC&S* nor how long it would take for DuPont's insulators to install a product that AC&S supplied. On the contrary, Mr. Webbe testified that DuPont's internal insulators only handled small repair and insulation jobs. (Deposition of Bill Webbe, January 18, 1998, pp. 11/26-12/2). Assuming AC&S only supplied one shipment of Thermobestos and one shipment of Unibestos as evidenced by the record, this supports a stronger inference that Mr. Webbe would not have been exposed to a product supplied by AC&S with the requisite frequency and regularity to constitute more than *de minimis* exposure. *See Lohrmann v.*

Pittsburgh Corning Corp., 782 F.2d 1156, 4 (4th Cir. 1986) (even thirty days of exposure, more or less, is insignificant as a causal factor for asbestos-related illness).

It follows that if Mr. Webbe was not exposed to an asbestos-containing product that AC&S supplied to DuPont-Chattanooga with sufficient frequency and regularity to show more than *de minimis* exposure, neither was Nancy.

ii. AC&S's Role as a Contractor

Assuming *arguendo* that the Court finds that Plaintiff offered evidence that Mr. Webbe was exposed to asbestos-containing products that AC&S installed at DuPont-Chattanooga, and that Nancy was subsequently exposed to the same asbestos-containing dust on Mr. Webbe's work clothes, such exposure was *de minimis*.

In the first instance, there is no evidence that Mr. Webbe worked around AC&S's contractors during the contracting job in 1956, let alone with sufficient frequency and regularity. In fact, there is direct evidence that Mr. Webbe did not work with outside insulation contractors. (Deposition of Bill Webbe, January 18, 1998, pp. 11/26-12/2). Even if he did work around AC&S's workers during this contracting job, the record is silent as to the time interval he would have worked on the project and if he worked at said time interval for the entire project.

In the second instance, Mr. Webbe testified that during the contracting job AC&S performed in the early to mid-60's, he only checked on what AC&S's workers were doing on a few occasions, and there is no evidence that the materials that AC&S used contained asbestos (*Id.* at p. 12/14-30). Nevertheless, assuming that the materials did contain asbestos, "a few occasions" is insufficient to show more than *de minimis* exposure. *See Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 4 (4th Cir. 1986) (even thirty days of exposure, more or less, is insignificant as a causal factor for asbestos-related illness).

Lastly, Mr. Webbe testified that during the contracting job AC&S performed between 1965 and 1970, he would check on the AC&S workers every day, and the contracting job lasted for less than a year. (Deposition of Pete Smith, March 17, 2002, pp. 87/14-19, 87/20-22). However, the record is silent as to how frequently Mr. Webbe actually worked near the AC&S workers, i.e., if he was close enough to be exposed to dust, since Mr. Smith worked on a different side of the factory and would not be able to see what Mr. Webbe was actually doing. (*Id.* at pp. 37/17-38/2, 87/1-5).

It follows that if Mr. Webbe was not exposed to an asbestos-containing product that AC&S installed at DuPont-Chattanooga with sufficient frequency and regularity to show more than *de minimis* exposure, neither was Nancy.

D. Assuming Proximity, Frequency, and Regularity is Established, The Plaintiff Offers No Evidence of Negligence on the Part of AC&S.

Negligence is the failure of a party to use reasonable care. It is a breach of the duty that we owe to our fellow citizens to behave in a reasonable and safe manner. As explained by the Blackacre Supreme Court, "negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under existing circumstances." *Smith v. Owens Corning Corp.*, 75 Bl. S. Ct. 1486 (1955). This duty of care applies to manufacturers as well as individuals. In short, Blackacre courts have consistently held that a manufacturing company can be found to be negligent if it knew, or should have known, that the materials used in a product rendered the product dangerous to the health of the user. *Id.* at 1488. In determining if a manufacturer should have known that a product was dangerous, Blackacre courts have considered evidence of what similar manufacturers in the industry knew as well as evidence of warnings or medical studies known to the manufacturer. *Patterson v. Raybestos Manhattan*, 79 Bl. S. Ct. 86 (1975). Given the dearth of case law on the

subject in Blackacre, AC&S assumes Blackacre courts will apply this standard to contractors and suppliers, such as AC&S, in the same way that it has been applied to manufacturers.

In short, there is no evidence that AC&S knew, or should have known, about the dangers associated with asbestos-containing insulation products. Further, there is no evidence in the record that other suppliers and contractors knew about the dangers of asbestos.

Notably, Mr. Smith testified that he never saw warning signs or labels at DuPont-Chattanooga, or on asbestos-containing products, that described the dangers of asbestos. (Deposition of Pete Smith, March 17, 2002, pp. 10/24-11/9, 72/9-12). Thus, there were no signs or labels that would put AC&S on notice of any dangers.

Although Mr. Smith testified that he heard rumors in the parking lot among DuPont's insulators, where they speculated that asbestos might be bad for them, Mr. Smith called this *pure speculation*. (*Id.* at p. 139/12-23). This indicates that the dangers of asbestos were not widely known. Further, Mr. Webbe testified that DuPont's insulators did not work with outside contractors, so any inference that AC&S's workers may have learned of these rumors in the parking lot is also pure speculation. (Deposition of Bill Webbe, January 18, 1998, pp. 11/26-12/2).

E. <u>Assuming Proximity, Frequency, and Regularity is established in addition to Negligence, AC&S is Entitled to Partial Summary Judgment for Its Role as a Contractor Under the Blackacre Construction Statute of Repose.</u>

Blackacre has adopted a statute of repose for improvements made to real property. Under the construction statute of repose, any action based on an act or omission in design, planning, or management of construction, or during construction, is governed by an eight-year repose period. Bl. Code § 1-3. The statute states, in relevant part:

> *No action to recover for… bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any*

> *person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than eight years after the performance or furnishing of such services and construction.*

Id. Blackacre courts have already decided that installing insulation is a protected activity under the construction statute of repose. *Wood v. Eastern Insulation Co.*, 625 Bl. 2d 125 (1999). There, the reviewing court held that courts must determine whether the challenged actions constitute "an improvement to realty." *Id.* The Court considered this a "common sense" inquiry. *Id.* The factors the *Wood* court applied under this test include: (1) is the improvement permanent in nature; (2) does it add to the value of the realty, for the purposes for which it was intended to be used; and (3) was it intended by the contracting parties that the 'improvement' in question be an improvement to real property or did they intend for it to remain personalty. *Id.* In applying this test, the court relied on the intention of the parties. *See id.* (finding that the insulation was *intended by the parties* to be permanent in nature, did add to the value of the realty, and did *intend* for the insulation materials to become part of the real property itself) (emphasis added).

The latest contracting job AC&S performed at DuPont as supported by the record is sometime between 1965 and 1970. Even assuming the job was performed in 1970, this lawsuit was filed thirty-one years later, well beyond the eight-year repose period. Bl. Code § 1-3. Thus, the only question remaining is whether AC&S's contracting jobs constituted an improvement to realty as described by the *Wood* court. 625 Bl. 2d 125 (1999). Notably, this is a "common sense" factor test, so AC&S does not necessarily have to carry its burden on each individual factor.

As to the first factor, the record is clear that DuPont intended for AC&S's insulation to be permanent in nature. Mr. Smith testified that people buy insulation with the hope that it will be a permanent and fixed installation. (Deposition of Pete Smith, March 17, 2002, p. 38/14-24). He also agreed that asbestos-containing insulation was the industry standard because it was "the best."

(*Id.* at pp. 39/22-40/6). It can be strongly inferred that describing asbestos-containing insulation as "the best" suggests conformity with a purchaser's hope that the insulation will be a permanent and fixed installation.

As to the second factor, the record is clear that asbestos-containing insulation was intended to add value to the realty (DuPont's facility). Mr. Smith testified that insulation is supposed to prevent the loss of heat and energy. (*Id.* at p. 124/18-21). Mr. Smith also testified that asbestos-containing insulation is used because it is "effective," and it is industry standard because it is "the best." (*Id.* at pp. 39/3-14, 39/22-40/6). By reasonable inference, this suggests that asbestos-containing insulation is "effective" at preventing the loss of heat and energy and is the industry standard because it is "the best" at preventing the loss of heat and energy. Clearly, preventing the loss of heat and energy would increase the value of the realty by reducing energy costs.

As to the third factor, the record is clear that the 'improvement' in question was meant to be an improvement to real property rather than personalty. To this end, Mr. Smith agreed that the insulation at DuPont-Chattanooga became a part of the factory after it was installed. (*Id.* at pp. 44/20-45/1).

IV. CONCLUSION

The discovery completed to date has failed to produce any evidence that Plaintiff's Decedent, Nancy Costeloe, was exposed to any asbestos-containing product or material that was distributed or installed by AC&S, let alone with sufficient frequency and regularity necessary to hold AC&S liable. The absence of these critical elements of Plaintiff's cause of action precludes recovery in this instance.

In the first alternative, the discovery completed to date has failed to produce any evidence that AC&S was negligent in failing to warn about the dangers of asbestos-containing insulation

products. The absence of this critical element of Plaintiff's cause of action precludes recovery in this instance.

In the second alternative, the discovery completed to date indicates that AC&S's installation of insulation at DuPont-Chattanooga constituted an improvement to realty under the Blackacre construction statute of repose, as to which no reasonable jury could disagree. AC&S is therefore entitled to partial summary judgment on the contracting jobs AC&S performed at DuPont-Chattanooga.

WHEREFORE, Defendant, AC&S, Inc. hereby requests that this Court enter summary judgment in their favor as to Plaintiff David Costeloe, Individually and as Personal Representative of the Heirs and Estate of Nancy Costeloe, Deceased. Plaintiff has failed to satisfy several essential elements of proof, making summary judgment proper. In the alternative, AC&S requests that this Court enter partial-summary judgment in their favor on the contracting jobs AC&S performed at DuPont-Chattanooga. AC&S has demonstrated that the "common-sense" improvement to realty test under the construction statute of repose is satisfied as to which no reasonable jury could disagree. AC&S further requests all other appropriate relief.

This the 7th day of April, 2002.

Respectfully submitted,

Holmes, Brandeis, Elkins, Smith & Cohen, LLP

/s/ Andrew Morales
Andrew Morales
Blackacre Bar No. 12121212

Counsel for Defendant
AC&S, Inc.

Applicant Details

First Name	**Kasey**
Last Name	**Moraveck**
Citizenship Status	**U. S. Citizen**
Email Address	**kasey.moraveck@unc.edu**
Address	**Address** Street **135 Forsyth Drive** City **Chapel Hill** State/Territory **North Carolina** Zip **27517**
Contact Phone Number	**2032588909**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**25%**
Law Review/Journal	**Yes**
Journal(s)	**North Carolina Civil Rights Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Savasta-Kennedy, Maria
mskenned@email.unc.edu
919.843.9805
Wilson, Dane
Wilson.Dane@epa.gov
Judge Jefferson, Griffin
gij@coa.nccourts.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

KASEY MORAVECK

Chapel Hill, NC 27514 | 203-258-8909 | kasey.moraveck@unc.edu

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of North Carolina School of Law. I am writing to apply for a 2024-2025 clerkship in your chambers. I am interested in remaining in the southeast and as a former undergraduate of the University of Virginia I would welcome the opportunity to begin my legal career in Virginia.

I believe that I would make a strong addition to your chambers based on my analytical and legal writing skills that I have acquired from my prior work experiences. Before attending law school, I had a career as a process engineer where I consulted with industrial manufacturing clients to help solve their water sourcing, treatment, and disposal problems and produced the reports and memoranda and that supported this work. In doing so, I honed my writing skills to communicate complex technical and regulatory information clearly and succinctly. I have drawn upon my technical writing experience as a law student to develop a research-focused and clarity-based approach to legal writing. My legal internships with the Environmental Protection Agency and the North Carolina Court of Appeals have enabled me to sharpen my legal research and writing skills in producing professional legal documents.

My resume, writing sample, and law transcript are submitted with my application. Also submitted are letters of recommendation from Professor Savasta-Kennedy of the University of North Carolina (919-843-9805), the Honorable Judge Jefferson Griffin of the North Carolina Court of Appeals (919-831-3700), and Dane Wilson of the Environmental Protection Agency (202-564-0544). Please contact me if I can provide you with any additional information. Thank you for considering my application.

Respectfully,

Kasey Moraveck

KASEY MORAVECK

Chapel Hill, NC 27517 | 203-258-8909 | kasey.moraveck@unc.edu

EDUCATION

University of North Carolina Law School, Chapel Hill, NC — Expected May 2024
Juris Doctor | GPA: 3.622 | Class Rank: Top 25%

- Conference Editor, *North Carolina Civil Rights Law Review*, 2022–24
- Committee Member, Conference on Race, Class, Gender, and Ethnicity, 2023
- Center for Climate, Energy, Environment, and Economics (CE3) Scholar, 2023–24

University of Colorado Law School, Boulder, CO — May 2022
First-Year Law Student | GPA: 3.663 | Class Rank: 27/170

University of Virginia, Charlottesville, VA — May 2017
Bachelor of Science, Chemical Engineering | GPA: 3.162

- Thesis: The Social Climate and Infrastructure of Imperfect Produce Waste in America
- Capstone: Design and Specifications of Unit Operations in a Zero Waste Cocoa Manufacturing Facility
- Study Abroad: University of Melbourne, Melbourne, Australia (Spring 2016)

EXPERIENCE

Sage Patent Group, Raleigh, NC — May – Aug. 2023
Summer Associate

- Support patent prosecution team in writing patent applications and responding to Office Actions issued by the United States Patent and Trademark Office for telecommunications, semiconductor, software, and other technology clients.
- Assist litigation team in writing client opinion letters, developing litigation strategy, and performing legal research for federal patent infringement lawsuits.

North Carolina Court of Appeals, Raleigh, NC — Aug. – Dec. 2022
Judicial Intern for the Honorable Judge Jefferson Griffin

- Authored bench briefs analyzing the relevant law for upcoming cases and wrote draft opinions for a mixed docket of civil and criminal cases.

Environmental Protection Agency, Washington, DC — June – Aug. 2022
Law Clerk (Volunteer), Monfort Getches Public Service Fellow

- Performed legal research and wrote memoranda to assist the water enforcement division of EPA's Office of Enforcement and Compliance Assurance in its administrative and judicial enforcement cases.
- Supported enforcement cases pursued under the Clean Water Act, including actions brought against industries for PFAS violations, and the Safe Drinking Water Act.

Acequia Assistance Project, Boulder, CO — Oct. 2021 – Jul. 2022
Deputy Director

- Facilitated project operation by managing and directing 13 student teams providing free legal research to protect Colorado Hispano's acequia (community operated irrigation-ditch) traditions.
- Researched Hispano settlement patterns and identified acequias eligible for protection under Colorado law.

Brown and Caldwell, New York, NY (previously Houston, TX) — July 2017 – Apr. 2021
Industrial Water Process Engineering Consultant, EIT

- Led process engineering for construction and upgrades of industrial clients' wastewater treatment facilities, the largest facility treating 30 million gallons of water per day.
- Built business strategy and identified sales opportunities as a core member of company's data center and mission critical team working to expand the company's data center business with "Big Four" tech companies.
- Developed master plan for sourcing water and treating wastewater for greenfield hyperscale data center facility through 15-year build-out period, in collaboration with the municipality and state regulatory agency.

PUBLICATIONS & PRESENTATIONS

- Kasey Moraveck, Robert McCandless, Thomas Steinwinder & Carla De Las Casas, *Discharge versus Reuse of Datacenter Wastewater* (2019). Presenter at New York Water and Environment Federation's (WEF's) Annual Meeting, Feb. 2020.
- Kasey Moraveck, Jonathan Sandhu, Houston Flippin, *Sludge Reduction and Uncoupling, Treatability Surprise and Full-Scale Benefits* (2019). Presenter at WEF Technical Exhibition and Conference, Sept. 2019.
- Zachary B. Hoffman, Tristan S. Gray, Kasey B. Moraveck et al., *Electrochemical Reduction of Carbon Dioxide to Syngas and Formate at Dendritic Copper-Indium Electrocatalysts,* 7 ACS Catalysis 5381 (2017).

Internal Unofficial Transcript - UNC Chapel Hill

Name : Kasey Moraveck

Student ID: 730532323

Print Date : 2023-06-07

- - - - - Transfer Credits - - - - -

Transfer Credit from UNIVERSITY OF COLORADO

Applied Toward SL Juris Doctor Program

2022 Fall

TRAN	999	ACADEMIC TRANSFER HOURS	30.00	30.00 TR	
Course Trans GPA:	0.000	Transfer Totals :	30.00	30.00	0.000

- - - - - Academic Program History - - - - -

Program : SL Juris Doctor

2022-07-08 : Active in Program

2022-07-08 : Law Major

- - - - - Beginning of School of Law Record - - - - -

2022 Fall

LAW	241	ENVIRONMENTAL LAW	3.00	3.00 A	12.000
LAW	246	FED JURISDICTION	3.00	3.00 B+	9.900
LAW	262	ENV OCEAN & COASTAL LAW	3.00	3.00 A	12.000
LAW	266F	PROF RESPONSIBILITY	3.00	3.00 B+	9.900
TERM GPA :	3.650	TERM TOTALS :	12.00	12.00	43.800
CUM GPA :	3.650	CUM TOTALS :	12.00	42.00	43.800

2023 Spr

LAW	206	CRIM PRO INVESTIGATION	3.00	3.00 B+	9.900
LAW	232	CONFLICT OF LAWS	3.00	3.00 A-	11.100
LAW	275	SECURED TRANSACTIONS	3.00	3.00 B+	9.900
LAW	286	PATENT LAW	3.00	3.00 A-	11.100
LAW	510	ENVIRONMENTAL JUSTICE	3.00	3.00 A	12.000
TERM GPA :	3.600	TERM TOTALS :	15.00	15.00	54.000
CUM GPA :	3.622	CUM TOTALS :	27.00	57.00	97.800

This transcript represents courses taken as part of an undergraduate, graduate, or professional program; it may or may not represent all courses taken at the University of Colorado.

UNOFFICIAL TRANSCRIPT

NAME: Moraveck, Kasey Babe
STUDENT NR: XXX-XX-5218/110299347 BIRTHDATE : 05/11/XXXX
PRINT DATE: 05/24/2022
RANK: 27/170 AS OF 05/24/2022

Other Institutions Attended:

HIGHER EDUC. INSTITUTIONS: Butler University
Indianpolis IN 01/16 - 05/16

Univ Virginia
DEGREE: BAC 05/2017
Charlottesville VA 08/13 - 05/17

COURSE TITLE	CRSE NR	UNITS	GRADE	PNTS
--------- Fall 2021 CU Boulder ------				
School of Law	Law			
Contracts Instructor: Erik Gerding	LAWS 5121	4.0	B+	13.20
Legislation and Regulation Instructor: Sharon Jacobs	LAWS 5205	3.0	A-	11.10
Legal Writing I Instructor: Megan Hall	LAWS 5226	2.0	A-	7.40
Civil Procedure Instructor: Frederic Bloom	LAWS 5303	4.0	A-	14.80
Torts Instructor: Alexia Brunet	LAWS 5425	3.0	A	12.00
ATT 16.0 EARNED 16.0 GPAHRS 16.0 GPAPTS 58.50 GPA 3.656				
--------- Spring 2022 CU Boulder ------				
School of Law	Law			
Legal Writing II Instructor: Megan Hall	LAWS 5223	2.0	A-	7.40
Criminal Law Instructor: Ahmed White	LAWS 5503	4.0	B+	13.20
Property Instructor: Kristelia Garcia	LAWS 5624	4.0	A-	14.80
Foundations of Legal Research Instructor: Aamir Abdullah Graded P or F only; No student option.	LAWS 5646	1.0	P	0.00
Constitutional Law Instructor: Scott Skinner-Thompson	LAWS 6005	4.0	A	16.00
ATT 15.0 EARNED 15.0 GPAHRS 14.0 GPAPTS 51.40 GPA 3.671				

CUMULATIVE CREDITS :

	TR UNITS	CU UNITS	TOT UNITS	QUAL UNITS	QUAL PTS	GPA
LAW	0.0	31.0	31.0	30.0	109.90	3.663

***** END OF ACADEMIC RECORD ****

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my great pleasure to recommend Kasey Moraveck for a clerkship with your chambers upon her graduation in May 2024. I have written recommendations for many of my promising students over the past 25 years, but Ms. Moraveck is a standout. Why? Because in addition to being a whip-smart researcher and writer, Ms. Moraveck is intellectually curious. She has a love of learning -- and of life -- that makes her a joy to teach and to interact with. She will be a wonderful colleague wherever she ends up practicing law, and would be an outstanding addition to your chambers.

Ms. Moraveck was a student in my Environmental Law course last fall semester and my Environmental Justice course this past spring. The two courses require different skill sets and Ms. Moraveck excelled at both. Environmental law requires students to read, analyze and parse the complicated statutes, regulations and cases that govern pollution control in the United States. Ms. Moraveck grasped the intricacies of the Clean Air Act, the Clean Water Act, CERCLA and NEPA, as well as the complex web of underlying science, market and social forces underlying the regulation. She asked excellent questions in class and expertly applied her knowledge in the final examination, earning one of the few straight "A's" in the class.

Ms. Moraveck also earned one of the two "A's" I awarded in my Environmental Justice course this past spring semester. She researched, analyzed, and wrote an outstanding paper on the regulation of lead pipes used to deliver drinking water in the United States. Her analysis of the law, the science, health, and policy implications of our aging lead pipe infrastructure was thorough, accessible, precise, and beautifully written.

Ms. Moraveck is also an active member of UNC Law School's community, no easy task for a transfer student who arrived at Carolina at the beginning of her 2L year. In addition to being chosen as a CE3 Scholar for UNC Law's Center for Climate, Energy, Environment & Economics, Ms. Moraveck serves as a Conference Editor for the North Carolina Civil Rights Law Review, and helped put on last year's conference for the Committee on Race, Class, Gender and Ethnicity.

In addition to teaching environmental law courses, I am the Director of UNC Law's Externship Program. I have worked with literally hundreds of law students externing with judges at the state and federal levels, and I have learned what it takes for a student to successfully contribute to the work of chambers. Ms. Moraveck demonstrates the careful analysis, attention to detail and outstanding research and writing skills that are the hallmarks of an exceptional law clerk. I believe that she would make an excellent addition to your chambers, and I give her my highest recommendation.

Thank you for your consideration. Please do not hesitate to contact me at mskenned@email.unc.edu (or 919-843-9805) if you desire additional information.

Sincerely,

Maria Savasta-Kennedy
Clinical Professor of Law

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

March 1, 2023
Re: Kasey Moraveck

To whom it may concern:

I am proud to provide this recommendation for Kasey Moraveck, who served as a law clerk for me at the U.S. Environmental Protection Agency's Office of Civil Enforcement last year. During that time, she proved herself a wonderful addition to our legal team. Not only is the quality of Kasey's work excellent, but she consistently showed a willingness to take on complex legal issues. She provided valuable assistance to many of my colleagues, and we truly missed having Kasey in our division when her clerkship was over. However, I am always heartened when a bright, talented student chooses to spend their career finding ways to serve the public.

During Kasey's time here, she worked closely with our attorneys on a variety of matters, including performing legal research on state and federal statutes, preparing memos, and assisting in the development of enforcement documents. Because of her aptitude, we assigned Kasey to our most challenging and high-profile work. For one assignment she produced a memo outlining potential defenses to one of the biggest emergency actions that EPA has ever taken under the Safe Drinking Water Act to address PFAS contamination. The work she did to support that enforcement order had a real, measurable impact on human health and the environment.

As a career public servant, I am always encouraged when we see talented and successful students pursue opportunities in government and public service. I believe these opportunities make them more well-rounded candidates for any legal setting. Kasey easily stands among the best of these students. Do not hesitate to give her a chance to prove herself within your organization and immediately assign her to your most challenging and important work. She will prove to be among the most valued members of your team in short order.

Sincerely,

Dane A. Wilson
Attorney-Advisor
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC
(202) 564-0544
Wilson.dane@epa.gov

North Carolina Court of Appeals

Chambers of
Judge Jefferson Griffin

919-831-3700
PO Box 888, Raleigh, NC 27602
Jefferson.Griffin@coa.nccourts.org

RE: Recommendation of Kasey Moraveck for Judicial Clerkship 5 February 2023

Judge or Justice,

It is my pleasure to be able to recommend Kasey for a judicial clerkship. Kasey was an intern for me at the North Carolina Court of Appeals in 2022. She was with us for an entire semester. She integrated into our operations seamlessly. She was able to effectively work with my clerks to improve our efficiency. She performed numerous cite checks and assisted in legal research and drafting opinions.

Kasey has great attention to detail. All her assignments were completed thoroughly. She also had the skill and confidence to earn the respect of my clerks. She was able to make the most of her time with us by utilizing those relationships.

I assigned Kasey a case with an issue of first impression to our North Carolina courts. She was able to quickly analyze and apply the law from the federal courts and other jurisdictions. She also skillfully drafted a lot of the initial analysis. I have no doubt that she will excel in future writing opportunities.

She was diligent in her attendance and in completing tasks. Her work ethic was excellent during her time with us. I have no reason to believe that she would not be successful in any judicial clerkship. Her academic success speaks for itself and her performance working for me substantiates it.

Please let me know if you have any other questions or I can provide other information. You can reach me at gij@coa.nccourts.org.

Respectfully,

Jefferson Griffin
Judge
North Carolina Court of Appeals

KASEY MORAVECK

Chapel Hill, NC 27514 | 203-258-8909 | kasey.moraveck@unc.edu

WRITING SAMPLE

I completed the attached brief for my Ocean and Coastal Law course during my fall 2022 semester of my second year of law school. The attached version of the brief was the final assignment of the semester and is entirely my own writing and research. My professor reviewed an initial draft of the brief and provided one minor suggestion – that I include a parenthetical for one of the cases I cited.

For the purposes of the assignment, the professor presented the following hypothetical scenario based on real events that occurred along the North Carolina coast:

> The United States Army Corps of Engineers (the Corps) is responsible for the dredging of Beaufort Inlet to maintain the federally authorized Morehead City Harbor navigation channel in Carteret County, North Carolina. Dredging is a process by which sand and other material from the ocean floor is excavated to maintain a particular water depth in a navigation channel. The material removed from the bottom of the ocean is called "dredged material" and the Corps is also responsible for placing this material in approved ocean or land disposal sites. Pursuant to a settlement agreement between the Corps and Carteret County, the Corps agreed to prepare a new dredged material management plan (DMMP) and Environmental Impact Statement (EIS) for the Morehead City Harbor navigation channel for 2015 through 2034. In its final EIS, and later, in its Record of Decision, the Corps selected a recommended alternative to include the placement of dredged material, for the first time, on the beaches and off the coast of Shackleford Banks. Shackleford Banks is an 8-mile-long undeveloped barrier island that is part of the Cape Lookout National Seashore, which is owned and managed by the National Park Service (NPS). The NPS has also proposed Shackleford Banks for designation as a wilderness area and manages it as such. Vehicles are not allowed on the island, and it can only be reached by boat.

In this hypothetical, I was an attorney working for the North Carolina Coastal Federation (representing its Carteret County members challenging the Corps' decision to place dredged material on Shackleford Banks. I was asked to submit a brief in support of its motion for summary judgment to the United States District Court for the Eastern District of North Carolina. I argued that the Coastal Federation was entitled to summary judgement because its EIS was prepared in violation of the National Environmental Protection Act (NEPA).

For the sake of brevity, I have removed the Statement of Facts section of my brief. The entire brief is available upon request.

INTRODUCTION

For the first time since dredging of the Morehead City Harbor navigation channel began in 1910, the United States Army Corps of Engineers (the Corps) unlawfully plans to dispose of dredged material on the beaches and off the coast of Shackleford Banks, a barrier island known for its wilderness character. Shackleford Banks is an 8-mile-long barrier island that is part of the Cape Lookout National Seashore, one of ten national seashores in the United States. The National Park Service (NPS) has recommended that Shackelford Banks be managed as a wilderness area, and it is currently the only barrier island in North Carolina managed as such. The island is pristine and remote; it is only accessible by boat with vehicles prohibited on the island. The North Carolina Coastal Federation has 16,000 supporters, including those who reside in Carteret County and travel to Shackelford Banks to take advantage of its natural beauty and ample recreation activities including fishing, beachcombing, camping, and surfing.

The Corps' selection of Shackleford Banks as a disposal site violates the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). The Corps is responsible for managing dredging of the Morehead City Harbor navigation channel and prepared an environmental impact statement (EIS), pursuant to NEPA, to plan for the dredged material management of the channel from 2015 through 2034. In its EIS, the Corps failed to take a hard look at the indirect environmental effects of using Shackleford Banks as a disposal area. The North Carolina Coastal Federation moves for summary judgment because the Corps' EIS evaluation was arbitrary and capricious.

STANDARD OF REVIVEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). The APA authorizes a reviewing court to hold unlawful and set aside final agency actions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). A Record of Decision (ROD) under NEPA is a final agency action subject to judicial review under the APA. 40 C.F.R. § 1500.3(c) (2020).

A court can set aside an agency action as arbitrary and capricious under the APA if the agency has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court must make a factual inquiry to "consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgement." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Under NEPA, a court must ensure that the agency has taken a hard look at the environmental consequences of its proposed action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

STATEMENT OF FACTS

. . . .

ARGUMENT

I. The Corps violated NEPA and the APA by conducting an arbitrary and capricious EIS analysis.

The Corps' EIS analysis was arbitrary and capricious under the APA, and thus, in violation of NEPA, because it failed to take a hard look at the indirect environmental effects of disposing dredged material from the navigation channel on Shackleford Banks and off the island's coast. Congress enacted NEPA in 1969 to establish a national policy to "encourage productive and enjoyable harmony between man and his environment" and to promote efforts to

"prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. The preparation of an EIS serves NEPA's broad commitment to protecting and promoting environmental quality. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989). In part, an agency's EIS must include an evaluation of "the environmental impact of the proposed action" and "alternatives to the proposed action." 42 U.S.C. § 4332(1)(C). An agency must consider "ecological . . . aesthetic, historic, cultural, economic, social, or health" *direct*, *indirect*, and *cumulative effects or impacts* to the environment of all reasonable alternatives. 40 C.F.R. § 1508.1(g) (2020) (emphasis added).

The Corps violated NEPA and the APA by failing to appropriately analyze the indirect environmental effects of using Shackleford Banks as a disposal site in two ways. First, the Corps' conclusion that Shackleford Banks required and would benefit from renourishment was arbitrary and capricious. Second, the Corps' decision to dispose of dredged material in the middle of the island to offset shoreline loss was arbitrary and capricious because it is incongruous with the island's erosion and shoaling trends.

A. The Corps' conclusion that Shackleford Banks requires and would benefit from renourishment is unsupported.

In determining that Shackleford Banks, part of the Cape Lookout National Seashore, requires active intervention to offset erosion, the Corps did not sufficiently evaluate the indirect environmental effects of disposing of dredged material on its beaches and coast for the first time. An agency's determination is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018) (quoting *State Farm*, 436 U.S. at 43) (holding that a pipeline right of way issued by the NPS was arbitrary and capricious because the NPS failed to consider pipeline's effect on views from the Blue Ridge Parkway, whether drilling of the pipeline would remain consistent

with park purposes, and the risks of spills and fires from the pipeline). An agency must take "particular care" to evaluate how its actions will affect an area that "Congress has specifically designated for federal protection." *Nat'l Audobon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186-87 (4th Cir. 2005) (holding that an EIS prepared by the Navy was deficient because it did not sufficiently evaluate the effects of siting a landing field within five miles of a National Wildlife Refuge).

In its selection of Shackleford Banks as a disposal site, the Corps failed to take a hard look at the indirect esthetic effects of beach disposal on the island's natural and untouched character. The Corps characterized Shackleford Banks' esthetic resources to include expansive vistas, intimate-scale areas, variety, and remoteness. U.S. Army Corps of Eng'rs, *Integrated Dredged Material Management Plan and Environmental Impact Statement* 208 (2013) [hereinafter Army Corps EIS]. But the Corps neglected to evaluate how disposal of dredged material onto the beaches of Shackleford Banks would affect any of these esthetic resources in its environmental impact analysis. Without support, it claimed that its proposed plan would "improve esthetics" Army Corps EIS, *supra*, at 265. The Corps' consideration of the No Action alternative also failed to consider any potential esthetic benefits to leaving the island untouched. Army Corps EIS, *supra*, at 266. In sum, the Corps did not consider either the esthetic consequences of implementing its plan or benefits of not doing so. This lack of consideration was arbitrary and capricious under the APA because the Corps "entirely failed to consider an important aspect of the problem." *Sierra Club,* 899 F.3d at 293.

Esthetic impacts are especially important because Shackleford Banks is part of the Cape Lookout National Seashore. Congress designated the Cape Lookout National Seashore, which includes Shackleford Banks, "[i]n order to preserve for public use and enjoyment an area . . .

possessing outstanding natural and recreational values." 16 U.S.C. § 459(g). A Fourth Circuit case, *Nat'l Audubon Society v. Dep't of Navy*, demonstrates that an agency must closely scrutinize the environmental impacts of a proposed action that affects federally protected land. 422 F.3d at 181. In this case, the Navy prepared an EIS to select a location for a new landing field in North Carolina. *Id.* at 181. The Navy selected a location within five miles of the Pocosin Lakes National Wildlife Refuge. *Id.* The Fourth Circuit determined that the Navy's EIS was deficient, holding that the proximity of the landing field location to a wildlife area bore heavily in its inquiry and that the Navy's hard look must "take particular care to evaluate how its actions will affect the unique biological features of this congressionally protected area." *Id.* at 181, 186-87.

The Fourth Circuit's particular care standard for federally protected land applies to Shackleford Banks because it is part of the Cape Lookout National Seashore. Even more consequential than the *National Audubon Society* case where the Navy selected a landing field five miles away from a protected area, the Corps selected the protected beaches of Shackleford Banks themselves as a dredged material disposal site. The NPS manages the Cape Lookout National Seashore according to its 2006 Management Policies. Pursuant to the Organic Act, the NPS states that it "must leave park resources and values unimpaired." Nat'l Park Serv., *Management Policies* 11 (2006). Values subject to this non-impairment standard include: the park's scenery, scenic features, and natural landscapes. *Id.* at 11. These values reflect the esthetic resources that Shackleford Banks provides as a part of the Cape Lookout National Seashore, which is something the Corps purports to address in its EIS. *See* Army Corps EIS, *supra*, at 208, 265. However, the Corps did not include any analysis of the impact of dumping of dredged material onto the beaches of Shackleford Banks on the island's scenery and landscapes. Thus, the

Corps did not meet the hard look standard under NEPA nor the particular care standard required for federally protected lands in its environmental impact analysis.

In addition to its National Seashore protections, the NPS has proposed under the Wilderness Act that Shackleford Banks be designated as a wilderness, and currently manages it as such. Army Corps EIS, *supra*, at 216. The purpose of the Wilderness Act is to prevent the United States from being left without any "lands designated for preservation and protection in their natural condition." 16 U.S.C. §1311. The disposal of dredged material on Shackleford Banks will alter the island's natural condition, so doing so will directly contradict its management as a wilderness. In its EIS, the Corps acknowledged that the use of Shackleford Banks as a disposal site will cause it to "lose some of its natural character . . . due to active manipulation of the beach front" but clarified that this adverse impact would be temporary. Army Corps EIS, *supra*, at 272-73. However, disruption of the island's beaches every three years by dredged material will have long term and permanent effects on the island's wilderness character, because the island has never before been used as a disposal site. The Corps' failure to consider the long-term, indirect impacts to the wilderness character of Shackleford Banks was arbitrary and capricious because the Corps failed to address an important aspect of the problem.

The Corps also failed to consider that Shackleford Banks does not require stabilization and would benefit from allowing its natural processes to dominate. Its EIS acknowledges that "ecological systems on the island are substantially free from the effects of modern civilization and natural processes on the island are allowed to function free of human control or manipulation." Army Corps EIS, *supra*, at 216. Professor Stephen Fegley of the University of North Carolina considers leaving the island untouched as a benefit. He states that "the Corps and NPS do not recognize how rare and perishable an unnourished barrier island is where we can

observe and appreciate nature responding to environmental factors without our intervention." N.C. Coastal Fed'n, *Keep Shackleford Banks Pristine* 2 (2012). In contrast, the Corps concluded that Shackleford Banks requires active intervention to offset erosion, due in part to over a century of dredging the adjacent navigation channel. Army Corps EIS, *supra*, at 217. In making this determination, the Corps ignored two aspects of the problem. First, as explained by Professor Fegley, barrier islands are meant to be dynamic systems and that "trying to stabilize a barrier island actually removes this essential character." N.C. Coastal Fed'n, *supra*, at 2. Summarized by Dr. Orrin Pilkey of Duke University, "There is no erosion 'problem' at Shackleford." Second, the Corps ignores the possibility that the erosion is beneficial to the island. *Id.* at 1. Dr. Pilkey explains that Shackleford is doing exactly what it should be doing, which is thinning down to get ready for sea level rise. *Id.* The Corps' conclusion that stabilizing Shackleford Banks would provide long-term benefits to the island was arbitrary and capricious because it failed to address the contrary consideration that the dynamism of Shackleford Banks helps to protect the island.

B. The Corps' conclusion that dredged material placement on Shackleford Banks will mitigate the island's erosion is unsupported.

The Corps failed to support that dredged material placement in the middle of Shackleford Banks will reduce erosion on the western end of the island, considering the natural movement of sand along the island. An agency's determination is arbitrary and capricious if it "offered an explanation for its decision that runs counter to the evidence before the agency." *Sierra Club*, 899 F.3d at 293 (quoting *State Farm*, 436 U.S. at 43) (holding that a pipeline right of way issued by NPS was arbitrary and capricious because it cited an inapplicable statutory provision and inapplicable set of regulations in justifying its decision). In preparing its EIS, the agency is responsible for ensuring the scientific integrity of its analyses, making use of reliable existing

data and resources. 40 C.F.R. § 1502.23 (2020). While NEPA does not mandate that an agency reaches a particular result, it does prohibit uninformed agency action. *Robertson*, 490 U.S. at 350-51.

The Corps have assumed, without scientific analysis, that placement of dredged material in the middle of Shackleford Banks will reduce long-term erosion that occurs for the majority, on the western end of the island. The Corps completed a volumetric analysis of Shackleford Banks in its EIS. Army Corps EIS, *supra*, at 53. The results of this analysis are summarized in Figure 1.

Figure 1. Shackleford Banks Volume Loss by Station. *Id.*

From the data presented in Figure 1, the Corps concluded that the most significant erosion occurs at Station 424. *Id.* East of this, erosion is less significant or even non-existent; the eastern end of the island is gaining sand, a process known as accretion. Based on this data, rather than place dredged material on the western tip of the island where the erosion is most significant, the Corps chose to dispose of dredged material in the middle of the island, shown by the yellow bar in Figure 2.

Figure 2. Proposed Shackleford Banks Disposal Area. *Id.* at 56

Dr. Pilkey questions this decision by the Corps, stating that "it's not even clear that disposal of dredged material of the island will benefit the western tip." N.C. Coastal Fed'n, *supra*, at 1. The Corps explains that disposal on the middle of the island is necessary to "reduce rapid shoaling of the material back into the navigation channel." Army Corps EIS, *supra*, at 53. The island does experience shoaling on its western end, but the Corps provides no scientific explanation as to why disposal of material in the middle of Shackelford Banks will reduce shoaling on the western end of the island. Under NEPA's regulations, the Corps thus failed to "ensure the scientific integrity of its analysis." 40 C.F.R. § 1502.23. The Corps' primary reason for selecting Shackleford Banks as a dredged material disposal site is to reduce human-exacerbated erosion on the island. If the alternative the Corps selected will not solve this problem, the Corps has conducted an arbitrary and capricious EIS analysis.

The Corps also failed to appropriately consider the shoaling that occurs off Shackleford Banks in concluding that beach disposal will reduce erosion on the island. The Corps determined

that based on a western littoral transport rate, that dredged material placed in the middle of Shackleford Banks "should move toward the west and nourish the eastern side of the ebb tide delta." Army Corps EIS, *supra*, at 84. However, in making this determination, the Corps neglected to consider its own data that dredged material might shoal or fall back into the navigation channel. In its bathymetric analysis, the Corps found that the ebb tide delta region had generally been eroding from 1974 to 2009, but that shoaling had occurred right off the western tip of Shackleford Banks. *Id.* at 66-69. Despite the shoaling evidence before it, the Corps made an unsupported assumption that dredged material disposed on the beaches of Shackleford Banks would not be subject to the shoaling observed for over 30 years off the island, instead assuming that the sand would remain on the island to help mitigate the effects of erosion. Because the Corps offered an explanation for its decision that ran counter to the evidence in front of it, its erosion analysis was arbitrary and capricious under the APA.

CONCLUSION

In selecting Shackleford Banks as a disposal site, the Corps arbitrarily and capriciously conducted its EIS analysis, violating NEPA and the APA. The North Carolina Coastal Federation plaintiffs request that the Court grant their motion for summary judgment.

Respectfully submitted on this 16th day of November, 2022.

Applicant Details

First Name	**Brady**
Middle Initial	**D**
Last Name	**Morris**
Citizenship Status	**U. S. Citizen**
Email Address	**brady.d.morris@vanderbilt.edu**
Address	**Address** Street **444 Elmington Ave Apt 425** City **Nashville** State/Territory **Tennessee** Zip **37205** Country **United States**
Contact Phone Number	**5079900647**

Applicant Education

BA/BS From	**Loyola University Chicago**
Date of BA/BS	**May 2021**
JD/LLB From	**Vanderbilt University Law School** **http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Vanderbilt Journal of Transnational Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Vanderbilt Bass, Berry, & Sims Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Maroney, Terry
terry.maroney@vanderbilt.edu
615-343-3491

Wuerth, Ingrid
ingrid.wuerth@vanderbilt.edu
615-322-2304

Shaw, Matthew
matthew.shaw@vanderbilt.edu
9173997599

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brady DeLane Morris
2902 Fremont Ct. SW
Rochester, MN 55902

June 12, 2023

The Honorable Judge Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

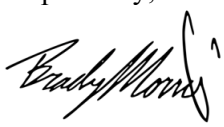
Dear Judge Walker:

I am a second-year student at Vanderbilt University Law School writing to express my sincere interest in a judicial clerkship in your chambers beginning in 2024. I hope to have a legal career in federal public service, and I believe your background with the Department of Justice would make a clerkship experience in your chambers particularly rewarding.

As a first-generation graduate student, I am deeply motivated to learn and succeed in the legal field—and to put the privilege of a legal education to work in public service. I view a judicial clerkship not only as an opportunity to learn and grow professionally, but as an opportunity to serve the justice system and the Chicago community. As the Executive Article Selection Editor of the Vanderbilt Journal of Transnational law, I have deepened my involvement in legal scholarly writing, and I find fulfillment in playing a small role in shaping international legal scholarship. I believe my academic experiences, as well as experience in public service at both the state and federal level, would help me contribute positively and collaboratively toward resolving the complex legal issues that will come up on the docket.

Enclosed please find my resume, transcript, and writing sample; the clerkship office has enclosed letters of recommendation from Professors Matthew Shaw, Ingrid Brunk, and Terry Maroney. Please let me know if there is any additional information I can provide. Due to frequently poor cell phone reception in my office, if you are unable to reach me by phone, please reach out by email. I am sincerely grateful for your consideration of my application to serve as a judicial clerk in your chambers.

Respectfully,



Brady Morris

BRADY D. MORRIS

2902 Fremont Ct. SW, Rochester, MN 55902 | (507) 990-0647 | brady.d.morris@vanderbilt.edu

EDUCATION

VANDERBILT LAW SCHOOL — Nashville, TN
Candidate for *Doctor of Jurisprudence* — May 2024
GPA: 3.811
Honors: Dean's List (Spring 2022, Fall 2022); Phi Delta Phi; Dean's Leadership Award
Journal: VANDERBILT JOURNAL OF TRANSNATIONAL LAW
Leadership: *Executive Article Selection Editor*, VANDERBILT JOURNAL OF TRANSNATIONAL LAW; *Treasurer*, International Law Society
Activities: Moot Court; Co-Counsel Mentor; Legal Aid Society; Environmental Law Society; Space Law Society; Vanderbilt in Venice; Mock Trial; Vanderbilt Law School 1L Ambassador

LOYOLA UNIVERSITY CHICAGO — Chicago, IL
Bachelor of Business Administration, honors, *summa cum laude*, Finance — May 2021
GPA: 3.978
Honors: Business Honors Program; Alpha Sigma Nu; Dean's List; PNC Student Achiever
Activities: Student Government, Student Representative to the Board of Trustees; Quinlan Ambassador Program, Co-Chair; Campus Ministry; Chamber Choir; Delta Sigma Pi; John Felice Rome Center, Weinig Traveling Fellow, *Rome, Italy*.

EXPERIENCE

U.S. DEPARTMENT OF STATE — Washington, D.C.
Intern, Office of the Legal Advisor — Summer 2023
- Conduct legal research and analysis for the Offices of Political-Military Affairs and Employment Law on international legal issues and employment policy and disputes against the department
- Draft memos on domestic and international legal issues and assist in drafting briefs representing the Department before administrative bodies including the EEOC and MSPB

TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION — Nashville, TN
Summer Legal Intern, Office of General Counsel — June – August 2022
- Conducted legal research and drafted and edited memoranda, administrative orders and motions, and professional correspondence on issues of environmental law, administrative law, public land management issues, and general state government administration
- Attended administrative board meetings and legislative committee hearings

VANDERBILT LAW SCHOOL; GLOBAL RIGHTS COMPLIANCE — Nashville, TN
Legal Analyst — May – June 2022
- Researched and analyzed counterterrorism law and terrorist activity in West African countries for a report produced for the U.S. Department of State

MORNINGSTAR, INC — Chicago, IL
Summer Intern — July 2020
- Collaborated with a team to innovate and present the winning product solution for a problem pertaining to integrating sustainable investing (ESG) data into the Private Equity Markets

A CUT ABOVE LAWN SERVICE, LLC — Rochester, MN
Operations Assistant — 2014 – 2020
- Worked with family business to operate machinery and maintain excellent customer relationships

HOBBIES & INTERESTS

Singing, playing, and performing music and theatre, and learning new instruments; Spending time exploring the outdoors hiking, skiing, and traveling; Cooking & Baking as a Food Network Enthusiast; American Cancer Society's Relay for Life; Theatre Camp Instructor; Music Ministry

OFFICE OF THE UNIVERSITY REGISTRAR
NASHVILLE, TENNESSEE 37240

VANDERBILT UNIVERSITY

Name : **Brady Morris**
Student # : **000765620**
Birth Date : **08/20**

Date: 06/04/2023

Academic Program(s)

Law J.D.
Law Major

Law Academic Record (4.0 Grade System)

2021 Fall

LAW 6010	**Civil Procedure**	4.00	**A-**	14.80
Instructor:	Nicholas Zeppos Nikki Younger			
LAW 6020	**Contracts**	4.00	**B+**	13.20
Instructor:	Rebecca Allensworth			
LAW 6040	**Legal Writing I**	2.00	**A**	8.00
Instructor:	Kelly Murray Jennifer Swezey Jacqueline Pittman			
LAW 6060	**Life of the Law**	1.00	**P**	0.00
Instructor:	James Rossi Edward Cheng			
LAW 6090	**Torts**	4.00	**B+**	13.20
Instructor:	James Rossi			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	14.00	49.20	3.514
CUMULATIVE:	15.00	14.00	49.20	3.514

2022 Spring

Term Honor: Dean's List

LAW 6030	**Criminal Law**	3.00	**A-**	11.10
Instructor:	Terry Maroney			
LAW 6050	**Legal Writing II**	2.00	**A-**	7.40
Instructor:	Kelly Murray Jacqueline Pittman			
LAW 6070	**Property**	4.00	**A**	16.00
Instructor:	Christopher Serkin			
LAW 6080	**Regulatory State**	4.00	**A**	16.00
Instructor:	Kevin Stack			
LAW 8020	**Adv Topics Int'l Humanitarian**	3.00	**A-**	11.10
Instructor:	Michael Newton			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	16.00	16.00	61.60	3.850
CUMULATIVE:	31.00	30.00	110.80	3.693

2022 Summer

LAW 7068	**Comp Perspec Counter Te**	2.00	**A**	8.00
Instructor:	Michael Newton			
LAW 7252	**International Arbitration**	2.00	**A**	8.00
Instructor:	Timothy Meyer			
LAW 7718	**Transnational Litigation**	2.00	**A**	8.00
Instructor:	Ingrid Wuerth			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	6.00	6.00	24.00	4.000
CUMULATIVE:	37.00	36.00	134.80	3.744

2022 Fall

Term Honor: Dean's List

LAW 5770	**Jrn'l Transnat'l Law**	0.00	**P**	0.00
Instructor:	Ingrid Wuerth			
LAW 5900	**Moot Court Competition**	1.00	**P**	0.00
Instructor:	Susan Kay Kendall Jordan			
LAW 7078	**Constitutional Law I**	4.00	**A**	16.00
Instructor:	Matthew Shaw			
LAW 7116	**Corporations & Bus. Ent.**	4.00	**A-**	14.80
Instructor:	Brian Broughman			
LAW 7221	**Human Trafficking Short Course**	1.00	**P**	0.00
Instructor:	Michael Newton John Richmond			
LAW 7266	**Int'l Criminal Law**	3.00	**A**	12.00
Instructor:	Michael Newton			
LAW 7571	**Outer Space Law Short Course**	1.00	**P**	0.00
Instructor:	Steven Mirmina			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	14.00	11.00	42.80	3.890
CUMULATIVE:	51.00	47.00	177.60	3.778

2023 Spring

LAW 5770	**Jrn'l Transnat'l Law**	1.00	**P**	0.00
Instructor:	Ingrid Wuerth			
LAW 7180	**Evidence**	4.00	**A**	16.00
Instructor:	Garrick Pursley			
LAW 7284	**Intn'l Protection/Human**	3.00	**A-**	11.10
Instructor:	Michael Newton			
LAW 7600	**Professional Respons.**	3.00	**A**	12.00
Instructor:	Mozianio Reliford			
LAW 7614	**Public International Law**	3.00	**A**	12.00
Instructor:	Ingrid Wuerth			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	14.00	13.00	51.10	3.930
CUMULATIVE:	65.00	60.00	228.70	3.811

Morris

Brady Morris

SIGNATURE IS WHITE WITH A GOLD BACKGROUND.
A RAISED SEAL IS NOT REQUIRED.

BART P. QUINET
ASSISTANT PROVOST
AND UNIVERSITY REGISTRAR

OFFICE OF THE UNIVERSITY REGISTRAR
NASHVILLE, TENNESSEE 37240

VANDERBILT UNIVERSITY

Name : **Brady Morris**
Student # : **000765620**
Birth Date : **08/20**

Information contained in this document is confidential and should not be released to a third party without the written permission of the student.
A black and white document is not official.

Date: 06/04/2023

---------- NO ENTRIES BELOW THIS LINE ----------

Morris

Brady Morris

SIGNATURE IS WHITE WITH A GOLD BACKGROUND.
A RAISED SEAL IS NOT REQUIRED.

BART P. QUINET
ASSISTANT PROVOST
AND UNIVERSITY REGISTRAR

Vanderbilt University
Office of the University Registrar
PMB 407701
110 21st Avenue South, Suite 110
Nashville, TN 37240-7701
615-322-7701
university.registrar@vanderbilt.edu
registrar.vanderbilt.edu

Academic Calendar: The academic year consists of fall and spring semesters and a summer term. The Doctor of Medicine program is offered on a year term.

Academic Units: Credit hours are semester hours except in the Doctor of Medicine program. Credits in the Doctor of Medicine program are course- or rotation-based.

Accreditation: Vanderbilt University is accredited by the Southern Association of Colleges and Schools.

Release of Information: This document is released at the request of the student and in accordance with the Family Educational Rights and Privacy Act of 1974. It cannot be released to a third party without the written consent of the student.

Course Numbers (effective Fall 2015):
0000-0799 Non-credit, non-degree courses; do not apply to degree program
0800-0999 Courses that will eventually be given credit (e.g., study abroad)
1000-2999 Lower-level undergraduate courses
3000-4999 Upper-level undergraduate courses
5000-5999 Introductory-level graduate and professional courses (including those co-enrolled with undergraduates)
6000-7999 Intermediate-level graduate and professional courses
8000-9999 Advanced-level graduate and professional courses

Additional information on course numbering is available at registrar.vanderbilt.edu/faculty-staff/course-renumbering/.

Course Numbers (prior to Fall 2015):
100- and 1000-level courses are primarily for freshmen and sophomores. May not be taken for graduate credit.

200- and 2000-level courses are normally for juniors and seniors. Selected courses may be taken for graduate credit.

300-, 3000-, and above-level courses are for graduate and professional credit only - unless special permission is granted.

Grading Systems:
For information about grading systems in place prior to the dates listed, visit registrar.vanderbilt.edu/transcripts/transcript-key/.

College of Arts and Science (A&S), effective Fall 1982;
Blair School of Music (BLR), effective Fall 1986;
Divinity School (DIV), effective Fall 1983;
Division of Unclassified Studies (DUS), effective Fall 1982;
School of Engineering (ENG), effective Fall 1991;
Graduate School (GS), effective Fall 1992;
Law School (LAW), effective Fall 1988;
School of Medicine (MED), Medical Masters and other Doctoral Programs, effective Fall 2010;
School of Nursing (NURS), effective Fall 2007;
Peabody College (PC) undergraduate, effective Fall 1990;
Peabody College (PC) professional, effective Fall 1992.

A+	4.3	LAW only
A+	4.0	Not in A&S, DIV (or BLR, PC as of Fall 2012)
A	4.0	
A-	3.7	
B+	3.3	
B	3.0	
B-	2.7	
C+	2.3	
C	2.0	
C-	1.7	
D+	1.3	Not in PC professional, NURS (or GS, MED as of Fall 2011)
D	1.0	Not in PC professional, NURS (or GS, MED as of Fall 2011)
D-	0.7	Not in PC professional, MED, NURS (or GS as of Fall 2011)
F	0.0	

Owen Graduate School of Management (OGSM)

Master of Accountancy, effective Fall 2011.		**All Management Programs,** effective Fall 2007.		
A	4.0	SP	Superior Pass	4.0
A-	3.5	HP	High Pass	3.5
B	3.0	PA	Pass	3.0
B-	2.5	LP	Low Pass	2.5
F	0.0	F	Fail	0.0

School of Medicine (MED) Doctor of Medicine Program, effective 2003.

H	Honors	Superior or outstanding work in all aspects.
HP	High Pass	Completely satisfactory work with some elements of superior work.
P	Pass	Completely satisfactory work in all aspects.
P*	Marginal Pass	Serious deficiencies requiring additional work (temporary grade).
F	Fail	Unsatisfactory work.

Current and Cumulative Statistics:

EHRS	Earned Hours
QHRS	Quality Hours
QPTS	Quality Points
GPA	Grade Point Average (calculated as GPA = QPTS/QHRS)

Other Symbols:

AB	Absent from final examination (temporary grade)**
AU/AD	Audit**
AW	Audit Withdrawal**
CE	Credit by Examination
CR	Credit only (no grade due)
E	Condition, with permission to retake exam (temporary grade)**
H	Incomplete in Arts and Science Honors course (temporary grade)**
	Honors in Divinity School**
I	Incomplete (temporary grade)**
IP	In Progress (temporary grade)**
LP	Low Pass (DIV, GS)**
M	Absent from final examination (temporary grade)**
MI	Absent from final examination and incomplete (temporary grade)**
NC	No credit toward current degree**
NO EQ	Transfer or study abroad coursework with no Vanderbilt equivalent
P	Pass**
PI	Permanent Incomplete (DIV, GS, LAW, MED)**
PM	Pass-Medical (GS only)
R	Repeat of previous course
RC	Previous trial of repeated course**
S	Satisfactory**
U	Unsatisfactory**
W	Withdrawal**
WF	Withdrawal while failing**
WP	Withdrawal while passing**
X	Grade unknown, hours earned awarded**

** Does not affect grade point average. (Prior to Fall 2008, the AB, I, M, and MI grades were calculated as an F in A&S and PC.)

UNIV: Courses offered in the UNIV subject are University Courses. The University Course initiative was developed to promote new and creative trans-institutional learning. For more information, please see vu.edu/university-courses.

For changes to this key since the last revision, please visit registrar.vanderbilt.edu/transcripts/transcript-key/.

Revised 5/1/2022

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Brady Morris, a rising 2L, for a clerkship in your chambers.

I had the pleasure of teaching Brady in Criminal Law during the Spring 2022 semester, during which time I got to know him well—not always the case in a large 1L class. His interest in the subject matter was evident throughout: Brady was always paying attention, always tracking the material, always ready with a correct answer when called on. He was one of the cluster of students who consistently came to office hours to talk through ideas, implications, and extensions of what we were learning. The class is more interactive than many in the 1L curriculum, involving participation in an online discussion board, one small-group discussion section, and two formative-evaluation quizzes. Brady was fully immersed in all of it. He did very well on both quizzes, showing that he was integrating and applying the material as we worked through it (rather than cramming at the end). Not surprisingly, given his undergraduate business background, Brady chose the small-group section on corporate criminal liability. It was a pleasure to see him thinking through the challenges of using criminal law as a tool to deter or respond to corporate wrongdoing without stifling legitimate business interests.

In short, Brady was terrific. I was not surprised that he earned a very good grade in Criminal Law. (The curve is pretty unforgiving, and when I looked back just now at the spreadsheet, I saw that Brady was right at the breakpoint between A and A-.) Indeed, Brady earned very good grades across the board, particularly in the spring semester and this summer's Vanderbilt in Venice program. I love seeing a student who starts out solid in the first semester move solidly into excellent territory in the second one: to me, it is a good sign of flexibility in learning. All the students tend to improve from an objective standpoint, given that all of them have more experience in law school, but the curve favors those whose acclimation to that style of learning and testing is particularly strong. Brady knows how to adapt to new learning environments—a quality that will serve him well in a clerkship.

I'd like to point out two other strong signals of the kinds of skills Brady will bring to a clerkship. One, he performed very well in Legal Writing. Two, he has earned a spot on our Journal of Transnational Law, where he will gain valuable experience in writing and editing.

Brady is also a delightful person to be around. We share an interest in music and theater, and he is fun to connect with on that level. He also has shown himself to be an active and committed member of our Law School community. Brady is involved in the International Law Society, serves as a mentor with our Co-Counsel program, and participated in Mock Trial.

Finally, Brady's career ambitions are a great match with his experience and interests. He came to Vanderbilt Law after graduating summa cum laude from Loyola University Chicago, where he earned high honors in both Finance and Political Science. He hopes to both practice at a law firm (where his business and finance background will be quite helpful) and to serve in government (ditto for political science). This summer he is interning at the Office of the General Counsel at the Tennessee Department of Environment and Conservation, getting his first taste of government legal service. I know he is very enthused about clerking for many reasons and deepening his public-service commitment is one of them.

I hope you will consider Brady Morris for a clerkship. Please do not hesitate to contact me with any questions or concerns.

Respectfully,

Terry A. Maroney
Robert S. and Theresa L. Reder Chair in La

Terry Maroney - terry.maroney@vanderbilt.edu - 615-343-3491

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Brady Morris for a clerkship. Brady has been a student in two of my classes, and I have worked with him in my role as the faculty advisor to the Vanderbilt Journal of Transnational Law. He is a talented and hard-working student with an excellent record both at Vanderbilt and as an undergraduate. I am confident that he has the skills necessary to serve as an outstanding clerk. Those skills are analytical reasoning, research and writing, and a strong work ethic. On a personal level, he is pleasant but professionally driven.

Brady has been my student in two upper-level classes: transnational litigation and public international law. In both classes his attendance was perfect, and he had clearly read carefully and thought about the material before each and every class session. He is a serious and committed student and he will be a serious and committed law clerk.

Equally important, Brady is also talented at legal reasoning. He did an impressive job with difficult material in both of my classes. Transnational litigation is a mixture of treaties, domestic statutes, foreign laws, common law, and customary international law governing topics such as discovery, service of process, pre- and post-judgment restraint of assets, enforcement of judgments, anti-suit injunctions, and so on. It is challenging material to organize and apply to new facts. Brady did very well both in class and on the final examination. Public international law is about the relationships between nation-states in areas such as foreign direct investment, trade, human rights, armed conflict, climate change, the law of the sea, and more. Here, too, Brady excelled. In this class, law and political power are closely related, which is challenging for some students. Brady wrote excellent answers to policy-oriented questions about why states do and do not comply with treaties and also to more technical questions of treaty interpretation. Across both courses, he demonstrated very strong analytical reasoning skills. His grades in my classes, as well as his overall record at Vanderbilt, are outstanding.

Brady also has the legal research and writing skills necessary to clerk at an elite level. His grades in our highly competitive legal writing program were very high. In his role as a member of the executive board of the Vanderbilt Journal of Transnational Law, he evaluates manuscripts submitted for publication. I have been impressed with his sophisticated analysis of others' writing and arguments. Finally, his work this summer at the State Department involves substantial writing and legal analysis.

I urge you to interview and hire Brady Morris. He will be a committed, personable, and extremely effective law clerk. Let me know if I can answer any questions.

Sincerely,

Ingrid (Wuerth) Brunk
Associate Dean for Research
Helen Strong Curry Chair in International Law
Director, Cecil D. Branstetter Litigation & Dispute Resolution Program

Ingrid Wuerth - ingrid.wuerth@vanderbilt.edu - 615-322-2304

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I recommend Brady Morris for a judicial clerkship in your chambers with my highest endorsement. Brady is in equal measure intellectually curious, pragmatic, and thoughtful. As you may observe from his transcript, he is agile in his ability to engage deeply in subject matters as wide ranging as administrative law, property, and business organizations. You have no doubt received many applications, and will assuredly read many letters extolling the virtues of deserving law students. I write to share insights from his performance in my constitutional lawcourse that I hope illuminates just how sterling Brady Morris is as an emerging lawyer.

Brady is a stand-out student among stand-out students. More than any other student in my class of 66, he tackled the unenviable tasks of understanding current constitutional doctrine, identifying opportunities to ask consequential questions, and proposing workable interventions to advance the goals of equal protection while honoring the structural constraints of constitutional federalism and separation of powers. Brady excels at the almost lost arts of respecting all sides of an issue and harmonizing across disagreements without abandoning principle. I quickly came to rely on Brady as more than a student but rather as a thought partner who co-faciliated provocative, expository conversation on the promise and limits of constitutional law. Whenever I needed a student-led example of deft navigation of competing constitutional issues I turned to Brady Morris; he never disappointed.

Perhaps what makes Brady stand out most are his modesty and selflessness. Constitutional law issues have always been polemic because the resolution of any given case typically goes to the core of hard-fought rights. Brady understands that instinctively and actively seeks to avoid—and diffuses—unproductive strife in debate. I do not mean to suggest that Brady is not dispassionate or aloof; that is untrue. But what he does differently than most is focus his passion towards in depth, gimlet scrutiny of the law in search for opportunity to invite others to join his perspective. And he does so in respectful tone, careful measure, and secure knowledge of the subject material. Brady is a study in subtle humility in leadership.

He will bring all of these and more qualities as a discreet and dependable law clerk in your chambers. Brady's ability to rise to the moment required by the legal issues presented, the lives of people whom his analysis will influence, and professional duty and courtesy has few peers. He is naturally disposed toward high-quality work without ever losing sight of his obligation to the Bench to advise the appropriate outcome, and he works well both alone and in collaboration with others.

I do not take my responsibility as a professor or to the Bench lightly in recommendating Brady to you. He is more than capable of any task you set before him. You will never regret having invited Brady to your chambers for you will be as enriched for having known and worked with him as we are at Vanderbilt Law School. I am, thus, quite pleased to give Brady Morris my very highest recommendation to your chambers. I look forward to his beginning the next steps in his professional development. I am available to discuss Brady's application further should you require.

With my sincerest regards,

Matthew Patrick Shaw

Matthew Shaw - matthew.shaw@vanderbilt.edu - 9173997599

BRADY D. MORRIS
2902 Fremont Ct. SW, Rochester, MN 55902 | (507) 990-0647 | brady.d.morris@vanderbilt.edu

WRITING SAMPLE

The following writing sample was completed as part of the Vanderbilt Law 2022–23 Bass, Berry, & Sims Moot Court Competition. For the brief portion of the competition, my partner and I were assigned to write the respondent's brief to the U.S. Supreme Court in a criminal appeal.

The respondent (Mr. Pontecorvo) was the defendant in the criminal trial, a journalist convicted of federal espionage act charges for his photography of a military base. Following Mr. Pontecorvo's successful appeal in the Twelfth Circuit, the Supreme Court granted the government's petition for certiorari.

I wrote the First Amendment portion of the brief attached below; I have redacted the work of my partner. In addition to this brief, we competed in two rounds of oral arguments—an on-brief and an off-brief round. All citations in the brief are in accordance with Bluebook rules.

I certify that this work is my own, and that I did not receive editing feedback on the brief.

Brady DeLane Morris

STATEMENT OF FACTS

On July 23, 2020, journalist Carmine Giovanni Pontecorvo led a protest in front of the controversial Air Base Avellino. (D. Avellino at. *14.) From the public roadway in front of the base, he took photographs of the far-off base and had a brief altercation with Senior Airman Mason. (D. Avellino at *15.) Later that night, while Mr. Pontecorvo enjoyed the company of acquaintances at a friend's home, a police drone surreptitiously surveilled them through a skylight. (D. Avellino at *17.) With this footage, Airman Mason could identify Mr. Pontecorvo (D. Avellino at *17) and Avellino Police Department Detective Matthew Harris could later chase him down to arrest him (D. Avellino at *18), confiscating the journalist's investigative material as evidence for his arrest.

Air Base Avellino was built in 1984 and has been designated "confidential" under 18 U.S.C. § 795 ever since, preventing unauthorized photography. (D. Avellino at *14.) While the statute permits photography with permission, Air Base Avellino has denied every request from the public and journalists it has ever received—including over a dozen requests by Mr. Pontecorvo and yearly requests by the Avellino Times. (12th Cir. at *58-59.) The government's operation of the base has displaced long-time residents of Avellino due to skyrocketing real estate prices, leading to public outcry. (D. Avellino at *14.)

This discontent came to a head on July 23rd, 2020, when Mr. Pontecorvo, a journalist for the Avellino Times, led a protest march from Avellino city hall to the public road outside the base entrance. (D. Avellino at *14.) During the peaceful demonstration, several protestors—including Mr. Pontecorvo—took pictures of the base. (D. Avellino at *14.) The pictures taken by Mr. Pontecorvo from a public road show unknown structures on the base and primarily feature military airmen coming toward the protestors. (D. Avellino at *18.)

Military guards, after warning the protestors to cease photography, demanded Mr. Pontecorvo turn over his camera or be subject to immediate arrest. (D. Avellino at *15.) When Mr. Pontecorvo stood his ground, guard Airman Mason attempted unsuccessfully to arrest him, causing a brief scuffle. (D. Avellino at *15.) Other protestors pulled Mr. Pontecorvo away, allowing the journalist to escape military detention. (D. Avellino at *15.) The military guards then proceeded to disperse the demonstration against their base. (D. Avellino at *16.)

ARGUMENT

I. Mr. Pontecorvo's First Amendment rights are violated by § 795, an impermissible form of content regulation on its face and as applied, which fails to survive strict scrutiny since the law's restrictions on speech are unnecessary and not narrowly tailored to serve the government's compelling interest in national security.

Our Constitution's First Amendment guarantees that "Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." U.S. Const. Amend. I. In order for the government to restrict this constitutional right by employing content regulation, it must overcome a presumption of unconstitutionality by surviving a strict scrutiny analysis. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-65 (2015). A content regulation only survives strict scrutiny if it is narrowly tailored regulation necessary to serve a compelling government interest. *See id.* at 163. A regulation that is underinclusive or overinclusive is not narrowly tailored. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015).

Here, Congress has enacted 18 U.S.C. § 795, which authorized the President to designate certain military installations or equipment as "vital" to national security, and criminalizes making "any photograph, sketch, picture, drawing, map, or graphical representation of such…without first obtaining permission of the commanding officer." Because this regulation only criminalizes speech depicting government infrastructure of a nature the government has

characterized as "vital," it is presumptively unconstitutional content regulation. *See Regan v. Time. Inc.*, 468 U.S. 641, 645-46 (1984).

This Court should affirm the Twelfth Circuit's holding finding § 795 is unconstitutional content regulation because it fails strict scrutiny on its face in lacking narrowly tailored necessity and is impermissible in application to these photographs not implicating national security.

A. In treating photographs disparately based on their "vital" nature, § 795 is content regulation of First Amendment-protected speech, necessitating a strict scrutiny analysis.

Laws regulating the content of speech otherwise protected under the First Amendment are subject to strict scrutiny. *See Reed*, 576 U.S. at 163-65; *Barr v. American Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020); *Regan*, 468 U.S. at 645-46. Photography is considered speech protected by the First Amendment's guarantees. *See Regan*, 468 U.S. at 646-649; *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

A restriction on speech is a form of content regulation when the government favors the nature or message of one type of speech over another. *See, e.g., Reed*, 576 U.S. at 163-64; *Barr*, 140 S. Ct. at 2346; *Regan*, 468 U.S. at 648-49. In *Regan*, the Court considered a statute making photographs of U.S. dollar bills unlawful unless the message conveyed was newsworthy or educational. *Regan*, 468 U.S. at 648. Because whether or not a photograph was lawful depended on the Government's determination of the newsworthy or educational nature of the message conveyed, the statute was engaging in constitutionally suspect content regulation. *See id.* Similarly, *Reed* considered a town ordinance providing different rules for signs communicating different messages, holding the ordinance was a clear form of content regulation. *See Reed*, 576 U.S. at 164. Because the "communicative content" of the sign governed its treatment, the ordinance was constitutionally suspect—no matter how rational of a way to regulate signs the

ordinance was. *See id.* at 164, 171. Finally, the *Barr* Court found a robocall regulation a form of content regulation because it allowed robocalls to collect government debt but prohibited robocalls for political or commercial purposes. 140 S. Ct. at 2346. Because the law favored speech relating to government debt collection over political or commercial speech, it exhibited a content regulation. *See id.*

The 12th Circuit correctly found the government engages in content regulation in § 795 by criminalizing the nature of only certain photographic subjects by designating them as "vital." *See Reed*, 576 U.S. at 163-64; *Barr*, 140 S. Ct. at 2346; *Regan*, 468 U.S. at 648-49. Under § 795, it is illegal to "make any photograph" of places and items the nature of which the President has designated as "vital military and naval installations or equipment." 18 U.S.C. § 795. As in *Regan*, where the newsworthy or educational nature of a photograph determined its legal treatment, a photograph's nature as "vital" to defense infrastructure determines its legal treatment under § 795. *See* 468 U.S. at 648-49. Because whether the nature of a photograph is "vital" determines its legal treatment, §795 engages in content regulation like the Court identified in *Regan*. *See id.* This regulation is also like the content-regulating ordinance in *Reed*, which made different rules for signs based on their "communicative content." *See* 576 U.S. at 163-64. Since section 795's different treatment of photographs communicating images of defense infrastructure is like that of the temporary directional signs in *Reed*, this Court should similarly hold § 795 is content regulation. Finally, similar to *Barr*—where the government treatment favoring its own debt in policing the content of robocalls was considered content regulation—§ 795 favors photographs that do not feature defense infrastructure. *See* 140 S. Ct. at 2346. Because photographs of "vital" infrastructure are disfavored like the political robocalls in *Barr*, § 795 should similarly be considered connotationally suspect content regulation. *See id.*

Even if this Court disagrees with both the District Court and the Twelfth Circuit in their findings that this law is a form of content regulation, this Court should find the statute unconstitutional in its application to Mr. Pontecorvo. *See Regan*, 468 U.S. at 648. The First Amendment permits speech restrictions not based on content regulation that "leave open adequate alternatives for communication." *See id.* But here, Mr. Pontecorvo, his employer, and anyone who was not a government contractor had been denied the opportunity to photograph Avellino Airbase despite their numerous requests. The statute requires permission to photograph the base, but if the base management never gives the press the opportunity to express their First Amendment views about the locally controversial base through photography from a public roadway, the government left Mr. Pontecorvo no alternative. *See id.*; § 795. The government did not offer an opportunity to photograph the base with reasonable time, place, or manner restrictions, instead it impermissibly left no adequate alternative by maintaining blanket criminalization. *See Regan*, 468 U.S. at 648. Because the government left no adequate alternative for journalists to exercise freedom of speech and press in covering this newsworthy subject—and because without these rights all our rights are at risk—this Court should hold the statute inapplicable to Mr. Pontecorvo's societally important photography even if it does not find § 795 impermissible content regulation. *See id.*

B. While the government may have a compelling interest in national security, § 795 fails to survive strict scrutiny on its face because is neither necessary nor narrowly tailored to accomplish this goal.

Laws subject to strict scrutiny, including those which impose restrictions on speech through content regulation, are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. As applied to the public, national security may generally be a compelling government interest for regulation. *See generally Snepp v. United States*, 444 U.S. 507 (1980);

Haig v. Agee, 453 U.S. 280, 308 (1981); *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953). However, the government's purpose in protecting national security does not shield it from the remainder of a strict scrutiny analysis. *See Reed*, 576 U.S. at 164-165. A regulation is narrowly tailored if it is neither underinclusive nor overinclusive in the restrictions it imposes to achieve the compelling interest. *See Williams*-Yulee, 575 U.S. at 448; *R.A.V. v. City of St. Paul,* 505 U.S. 377, 395 (1992); *City of Laude v. Gilleo*, 512 U.S. 43 (1994).

A regulation is underinclusive if it is not necessary to achieve the government's compelling interest. *See R.A.V.*, 505 U.S. at 395-96; *Reed*, 576 U.S. at 171; *Williams-Yulee*, 575 U.S. at 449; *Laude*, 512 U.S. at 51 ("the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles."). In *R.A.V.*, the Court considered a city ordinance ban on "fighting words" that restricted hate speech against certain categories like race, religion, or gender, but left other categories of hate speech—like that discriminating against sexual orientation—unrestricted. 505 U.S. at 391. The Court held the content restriction unconstitutional because the statute was not reasonably necessary to achieve the city's compelling interest, reasoning that "the existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of such a statute." *See id.* at 395-96. The *Reed* Court similarly held an ordinance limiting temporary directional signs unconstitutional for being "hopelessly underinclusive" because the town restricted certain signs, "while at the same time allowing unlimited numbers of other types of signs that create the same problem." 576 U.S. at 171-72. Because the town allowed some types of similarly problematic signs while prohibiting others without showing the restriction was necessary to achieve its interest in eliminating traffic safety hazards, the regulation was unconstitutionally underinclusive. *Id.* at 171-72. In contrast, *Williams-Yulee* held a content regulation survived strict scrutiny underinclusivity concerns

because it was "not riddled with exceptions," but rather "the solicitation ban aims squarely at the conduct most likely to undermine" the compelling government interest. 575 U.S. at 449.

A regulation is overinclusive if it reduces to a single dispositive factor. *See Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). The *Gratz* Court considered the constitutionality of the University of Michigan's one-hundred-point acceptance threshold for its undergraduate admission scheme, which automatically distributed twenty points to racially underrepresented applicants. 539 U.S. at 255. This Court held that this plan was not narrowly tailored because race was the decisive admission factor for almost every qualified minority applicant, not a wholistic review. *Id.* at 270-73. Similarly, the *Parents Involved* Court held school assignment plans were unconstitutional because race was the decisive factor by itself whenever it came into play in the assignment scheme. 551 U.S. at 723. Because race was not one factor weighed among others, but the dispositive factor, the government action was unconstitutional under strict scrutiny. *See id.*

A regulation may also be overbroad if it criminalizes otherwise constitutionally protected activity. *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005). In *Smith*, the Eleventh Circuit held that "the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest" is constitutionally protected by the First Amendment. 212 F.3d at 1333. The First Circuit has also upheld this constitutional right, holding that "gathering information" about police officers or government officials "in a form that can readily be disseminated to others serves a cardinal First Amendment interest." *See Glik,* 655 F.3d at 82. The *Robison* court similarly held that the First Amendment protected a person's right to video police officers on duty after Mr. Robinson was arrested for filming officers that he believed to be

unsafe. 378 F.Supp.2d at 541. The court also expressed concerns that the police actions in confiscating the tape and preventing future taping or publishing of the tapes was unconstitutional prior restraint. *Id.* Because the court found Mr. Robinson had a First Amendment right to record officers on duty, it awarded him compensatory and punitive damages. *See id.* at 546.

1. Section 795 fails strict scrutiny on its face because it is both fatally underinclusive and overinclusive.

The 12th Circuit correctly held that the statute is underinclusive because § 795's mode of content regulation is not necessary to achieve the national security interest. *See R.A.V.*, 505 U.S. at 395-96; *Reed*, 576 U.S. at 171; *Williams-Yulee*, 575 U.S. at 449; *Laude*, 512 U.S. at 51. Like the restriction in *R.A.V.* which was fatally underinclusive because the ordinance was not necessary in light of content-neutral alternative regulations, § 795's restriction on all photography is not necessary to achieve the government's interest in safeguarding national security. *See* 505 U.S. at 395-96. The government argues that criminalizing all photographs (even those taken from a public roadway) is the least restrictive means to protect its national security interest; but a regulation that would turn a passerby into a criminal for snapping a picture of an attention-drawing military base on their cellphone camera hardly seems like the least restrictive means of accomplishing national security. Less restrictive means are reasonably available to safeguard national security: the government may alternatively protect vital information by building opaque fences around secret areas and equipment, closing public roads far enough away from critical bases to prevent public views of sensitive activity, and instituting reasonable no fly zones around the base to prevent arial photography. Since all of these easily conceivable means would achieve the same compelling government interest in national security without infringing on the fundamental First Amendment rights of American citizens and journalists, the government has not selected the least restrictive means narrowly tailored to its

interest—rendering the statute unconstitutional under strict scrutiny. *See id.* The fact that there are many reasonable, less-restrictive alternative means show that this is not a failure of "perfect tailoring," but an unconstitutional failure to narrowly tailor the First Amendment restriction as required. *See Williams-Yulee*, 575 U.S. at 454.

Further, as in *Reed* and *Williams-Yulee*, this statute neglects to regulate other forms of content that create the same problem, rendering it "riddled with exceptions." *See id.*; *Reed*, 576 at 171-72. As the Twelfth Circuit correctly noted, that § 795 criminalizes photographs and sketches but not collecting the same information via GPS data, rangefinders, binoculars, and human observations renders it impermissibly underinclusive. *See Williams-Yulee*, 575 U.S. at 454; *Reed*, 576 U.S. at 171-72. (12th Cir. at *56-58.) The government may not take a shortcut through our constitutional rights in the name of efficiency or cost-effectiveness.

The Twelfth Circuit also correctly found § 795 overinclusive because a non-wholistic content review for "vital" nature is always the dispositive factor. *See Gratz*, 539 U.S. 244; *Parents Involved*, 551 U.S. 701. This statute makes it criminal to "make any photograph, sketch, picture, drawing, map, or graphical representation" of such bases, and the sole dispositive factor is that any visual media represents the "vital" base in some way. This dispositive factor makes § 795 similar to the unconstitutional affirmative action education policies in *Gratz* and *Parents Involved*. *See*, *Gratz*, 539 U.S. 244; *Parents Involved*, 551 U.S. 701. Despite the interest being national security, the visual representation need not put national security at risk to be criminal under this statute. A non-threatening photograph incidentally including the base taken a mile away is treated the same as a photo taken inside the base; this single dispositive factor analysis renders the content regulation unconstitutional. *See Gratz*, 539 U.S. 244; *Parents Involved*, 551 U.S. 701.

Finally, section § 795 is also impermissibly broad because it precludes the exercise of the right to film public officials on duty from public land, a "cardinal First Amendment interest." *See Smith*, 212 F.3d at 1333; *Glik*, 655 F.3d at 82; *Robinson*, 378 F.Supp.2d at 541. As in *Robinson*, this statute would permit the arrest of persons exercising their First Amendment right to record officials on duty. *Robinson*, 378 F.Supp.2d at 541. The government might properly choose to criminalize taking photos from inside "vital" installations, but a statute so overbroad as to make a criminal out of anyone taking photos of certain bases from anywhere—including from public roads and of content that may not implicate national security—is unconstitutional and may even be absurd. *See id.*; *Williams-Yulee*, 575 U.S. at 449. *Cf. Texas Brine Co., L.L.C. v. American Arbitration Ass'n, Inc.*, 955 F.3d 482, 486 (5th Cir. 2020) (statutes that lead to absurd results in application defeat Congress's intent).

1. <u>§ 795 is also unconstitutional in its application to Mr. Pontecorvo, even if it is not unconstitutional on its face.</u>

Because national security is not implicated in Mr. Pontecorvo's case, there is no compelling government interest as applied that permits the government's content regulation to survive strict scrutiny. *See Reed*, 576 U.S. at 163. It is the rightful purpose of the government to protect its people, but the phrase "national security" cannot be accepted as a compelling interest in each case without investigation. *Cf. Ellsberg v. Mitchell*, 709 F.2d 51, 60-61 (D.C. Cir. 1983) (explaining that the government, when it invokes national security, should be compelled to provide more explanation of why national security would be damaged). In this case, the record reveals the government has not and cannot show this photography implicates American national security. If a government doesn't want people to take pictures of "vital" defense infrastructure from a public road, it might consider securing any national security sensitive implements behind the cover of benign buildings to prevent onlookers from seeing things that would create a

national security risk. This is exactly what the government has done here. (D. Avellino at *18.) Anything that the average citizen can see from the public road, any of our nation's adversaries can see from a public road as well; that the government knows this explains why Mr. Pontecorvo captured nothing implicating the national defense from his public vantage point—there was nothing to capture, because the government has wisely hidden its secrets. That is why the government has admitted Mr. Pontecorvo's photographs were "unrevealing as to military secrets." (D. Avellino at *18.)

Section 795 also fails strict scrutiny because it is overinclusive as applied to Mr. Pontecorvo's case, in that it extinguishes a previously recognized First Amendment right to record public officials. *See Smith*, 212 F.3d at 1333; *Glik*, 655 F.3d at 82; *Robinson*, 378 F.Supp.2d at 541. Not only did Mr. Pontecorvo have the same First Amendment recording rights as the citizen in *Robinson*, Mr. Pontecorvo was also protected by the freedom of the press, covering the event for the Avellino Times. *See Robinson*, 378 F.Supp.2d at 541. (D. Avellino at *14.) Because § 795 would criminalize Mr. Pontecorvo's first amendment rights of speech and press, it is fatally overinclusive as applied. *See Smith*, 212 F.3d at 1333; *Glik*, 655 F.3d at 82; *Robinson*, 378 F.Supp.2d at 541.

Finally, this statute, which as applied could result in the government jailing a journalist for photographing military guards coming to quash a protest against their airbase (a photograph taken from a public road), is an absurd result. *See Texas Brine Co.*, 955 F.3d at 486; (D. Avellino at *14-16.) "The vice of content-based legislation…is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Reed*, 576 U.S. at 167 (quoting *Hill v. Colorado,* 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)). In using § 795's content restrictions to prevent the public from seeing important journalistic photographs such as

these—photographs that do not implicate national security interests—and to convict a journalist, the government would lend the statute to such invidious purposes. *See id.* Circumventing our Constitution, through this content regulation "the government might seek to select the "permissible subjects for public debate" and thereby to "control…the search for political truth." *Laude*, 512 U.S. at 51 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980)). Holding § 795 unconstitutional avoids this absurd and dangerous result.

Applicant Details

First Name	**Alexander**
Last Name	**Newman**
Citizenship Status	**U. S. Citizen**
Email Address	**alexandern42@gmail.com**
Address	**Address** Street **5509 S Hyde Park Blvd** City **Chicago** State/Territory **Illinois** Zip **60637** Country **United States**
Contact Phone Number	**3017879669**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**May 2020**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Legal Forum**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Strauss, David
d-strauss@uchicago.edu
Konsky, Sarah
konsky@uchicago.edu
773-834-3190
Masur, Jonathan
jmasur@uchicago.edu
773-702-5188

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Alexander Newman
5509 S. Hyde Park Blvd. | Chicago, IL 60637
alexnewman@uchicago.edu |301-787-9669

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term. Having grown up and previously worked in the Washington area, I have a particular interest in returning to the region to clerk.

A resume, law school transcript, and writing sample are enclosed. Letters of recommendation from Professors Konsky, Masur, and Strauss will arrive under separate cover. Should you require additional information, please do not hesitate to let me know. Thank you for your consideration.

Respectfully,

Alexander Newman

Alexander Newman

5509 S. Hyde Park Blvd., Apt. 2S, Chicago, IL 60637 • alexnewman@uchicago.edu • 301-787-9669

EDUCATION:

The University of Chicago Law School, Chicago, IL
Juris Doctor Candidate, June 2024

- **Journal:** *The University of Chicago Legal Forum*, Staff Member
- **Comment:** *Knock and Talks: Faithfully Applying Social Norms to Prevent Unconstitutional Police Intrusion upon the Home*, to be published in Vol. 2023
- **Activities:** Law Students for the Creative Arts, Hemingway Society

Washington University in St. Louis, St. Louis, MO
Bachelor of Arts with College Honors in Political Science and Art History, May 2020

- **Honors:** Dean's List, four semesters
- **Awards:** Murphy Family Prize for Best Essay in Art History, Art History and Archaeology Award for Excellence in Mentorship
- **Activities:** Washington University Political Review

EXPERIENCE:

Sullivan & Cromwell LLP, New York, NY
Summer Associate, June – August 2023

Jenner & Block Supreme Court and Appellate Clinic, Chicago, IL
Summer Intern, June – August 2022

- Helped draft a merits brief for the Supreme Court case *Haaland v. Brackeen*
- Drafted amicus briefs for *Perez v. Sturgis Public Schools* and *Pugin v. Garland*
- Reviewed circuit splits in preparation for petitions for certiorari

Democracy Summer PAC, Silver Spring, MD
Senior Fellow, May – August 2021

- Worked as a campaign fellow for Congressman Jamie Raskin's Leadership PAC
- Helped run a program training interns for over a dozen members of Congress
- Trained over 400 interns on basics of campaign organizing and fundraising

Washington University Department of Political Science, St. Louis, MO
Assistant in Instruction, Quantitative Political Methodology, August – December 2019

- Mentored students on topics of research design and statistical methods
- Instructed students on coding techniques using the programming language R

Washington University Learning Center, St. Louis, MO
Academic Mentor in Art History, August 2019 – May 2020

- Mentored students in weekly meetings on essay writing

Ben Jealous for Governor, Silver Spring, MD
Assistant to the Political Director, June – August 2018

- Contacted over 120 members of the Maryland House of Delegates, State Senate, and Baltimore City Council to organize political support and press events
- Assisted in creating the candidate's daily schedule

INTERESTS:

Solving the crossword every day, film photography, hiking in national parks

THE UNIVERSITY OF CHICAGO

Name: **Alexander Isaac Newman**
Student ID: **12109000**

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Washington University in St. Louis
Saint Louis, Missouri
Bachelor of Arts 2020

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	176
LAWS	30211	Civil Procedure Emily Buss	4	4	181
LAWS	30611	Torts Adam Chilton	4	4	180
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	179

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	179
LAWS	30411	Property Aziz Huq	4	4	177
LAWS	30511	Contracts Douglas Baird	4	4	178
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	179

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Alison Gocke	2	2	178
LAWS	30713	Transactional Lawyering Joan Neal	3	3	179
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	177
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	177

Summer 2022

Honors/Awards
The University of Chicago Legal Forum, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	50311	U.S. Supreme Court: Theory and Practice Req Designation: Meets Writing Project Requirement Sarah Konsky Michael Scodro	3	3	181
LAWS	53219	Counterintelligence and Covert Action - Legal and Policy Issues Stephen Cowen Tony Garcia	3	3	177
LAWS	53299	Class Action Controversies Michael Brody	2	2	180
LAWS	90219	Jenner & Block Supreme Court and Appellate Clinic Sarah Konsky David A Strauss	1	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	179
LAWS	45701	Trademarks and Unfair Competition Omri Ben-Shahar	3	3	179
LAWS	46101	Administrative Law David A Strauss	3	3	177
LAWS	90219	Jenner & Block Supreme Court and Appellate Clinic Sarah Konsky David A Strauss	1	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Date Issued: 06/04/2023

THE UNIVERSITY OF CHICAGO

Name: Alexander Isaac Newman
Student ID: 12109000

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	43218	Public Choice and Law Saul Levmore	3	3	176
LAWS	43244	Patent Law Jonathan Masur	3	3	182
LAWS	47101	Constitutional Law VII: Parent, Child, and State Emily Buss	3	3	181
LAWS	90219	Jenner & Block Supreme Court and Appellate Clinic Sarah Konsky David A Strauss	1	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

End of University of Chicago Law School

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

Professor David A. Strauss
Gerald Ratner Distinguished Service Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
d-strauss@uchicago.edu | 773-702-9601

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Alex Newman, who just finished his second year here, is a smart, thoughtful, well-rounded person, and he would be an excellent law clerk. I recommend him enthusiastically.

I've had the chance to see Alex in several different settings. I first encountered him in the summer after his first year of law school. I am the faculty director of our Supreme Court and Appellate Clinic, and we take on two students for the summer after their first year. We get a lot of excellent applicants, but Alex stood out; we thought he would be first-rate, and he was. Alex continued in the Clinic, taking it as a class during his second year, and he continued to do work at a high level. Then I was fortunate enough to have him in two regular classes, Administrative Law and the Constitutional Law class that covers federalism and separation of powers. In Administrative Law he was very solid; in Constitutional Law he was even better than that, in the top fifteen percent of a very strong class.

Let me mention two matters in particular. In the summer after Alex's first year, our clinic was co-counsel on the brief for the Indian Tribes who were defendants in Haaland v. Brackeen, No. 21-376, the case about the Indian Child Welfare Act that the Supreme Court recently decided (in our clients' favor). Our brief addressed a series of complicated issues that are not covered anywhere in the first year curriculum, and several experienced Supreme Court advocates were involved in drafting it. So there was no reason to think that someone like Alex, who had just finished his first year in law school, could contribute very much. But Alex made substantial contributions. He took the initiative on some important research; he asked probing questions about the arguments we were making; he saw connections among the cases we were working with; and he made specific suggestions that ended up playing a role in the brief we filed.

In the constitutional law class, Alex picked up where he left off. I remember specifically his analysis, on the exam and also in class discussion, of complicated questions about the so-called Anti-Commandeering doctrine (which was of course also a central issue in Brackeen). Students, understandably, often have a difficult time with that doctrine. But Alex was completely on top of it; it was, again, the kind of performance I had no right to expect from a student.

Alex is also a friendly, well-liked, and interesting person. In college, he was a double major in political science and art history, and by his own account he is a Chicago architecture buff; he takes his friends on architecture tours of the city. He has pursued his political interests as well, working for a member of Congress and on a gubernatorial campaign. He has both first-rate analytical ability and a good practical sense of how to work with people. He will be a terrific law clerk in all respects, and I am very happy to recommend him.

Sincerely,

David Strauss

Sarah M. Konsky
Director, Jenner & Block Supreme Court
and Appellate Clinic
Associate Clinical Professor of Law

1111 East 60th Street | Chicago, Illinois 60637
phone 773-834-3190 | fax 773-702-2063
e-mail konsky@uchicago.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Alex Newman, who just finished his 2L year at the Law School, has applied to you for a clerkship. Alex is great, and I'm happy to have the opportunity to recommend him.

I've taught Alex in a few different settings at the Law School. I'm the Director of the Law School's Supreme Court and Appellate Clinic, which represents clients in appellate cases. Alex worked full-time in our clinic as a summer associate during his 1L summer. He then took the clinic for course credit throughout his 2L year. I also taught Alex in a separate seminar course, U.S. Supreme Court: Theory and Practice. He did excellent work both in the clinic and seminar.

Alex was a strong clinic summer associate and continues to be a strong clinic student. He is bright, curious, and insightful. During his time in the clinic, he's researched complex legal issues, drafted sections of Supreme Court briefs, and helped formulate case strategies and arguments. His projects have spanned a wide range of challenging topics, including difficult constitutional and statutory interpretation questions. Alex did great legal research and analysis. Alex also is a very good writer – his written work product is clear and effective. (He's not yet received a grade for his clinic work, since he plans to enroll in the clinic again next school year.)

Alex did terrific work in the United States Supreme Court: Theory and Practice seminar course during the fall quarter of his 2L year, too. He earned a 181 in the seminar – an "A" grade on our Law School's strict grading curve. His graded work in this seminar included a mock Supreme Court brief and a mock Supreme Court oral argument. Alex excelled on these projects. His brief was well-written and persuasive. He identified smart arguments for his side, and then turned them into an effective and compelling brief. Alex's oral argument similarly was outstanding. His presentation was thoughtful and persuasive. He demonstrated both great preparation and a great ability to think on his feet.

I've appreciated having the chance to get to know Alex. He's been a good colleague in the clinic. He seems to work well with his peers and in groups. He also seems to be personable, likable, and unassuming. His contributions to our small-group and class discussions have been helpful.

Alex seems to be an interesting person (in a good way), too. I've enjoyed getting to talk to him about his hobbies. At our first lunch together, we had a fascinating discussion about his interest in film photography and slide film. He collects old cameras and photography equipment – he reports that his collection includes a camera that's more than 100 years old, as well as a Kodak Carousel projector from the 1960s. He explains that he likes the constraints and challenges of taking photographs with older cameras and equipment. Alex has a range of other neat interests. In undergraduate, he majored in both political science and art history. He explains that he's particularly interested in renaissance and modern architecture – and that he's become a Chicago architecture buff. His other hobbies include watching films (with a focus on older and foreign films), hiking, and camping.
I believe Alex would be a strong law clerk, and I'm glad to have the opportunity to recommend him.
Sincerely,

Sarah M. KonskDirector, Jenner & Block Supreme Court and Appellate Clinic
Associate Clinical Professor of Law

Professor Jonathan Masur
John P. Wilson Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jmasur@uchicago.edu | 773-702-5188

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to offer a very strong recommendation of Alexander (Alex) Newman for a judicial clerkship. Alex is extremely intelligent, unfailing diligent, and a talented legal writer. He is the type of lawyer who can be trusted with even the most complicated matters and counted upon to deliver great work when it counts. I am certain that he will be an excellent law clerk.

I first met Alex when he enrolled in my 1L Criminal Law class. My first academic interaction with him was when he raised his hand early in the course to offer a brilliant response to a question that had stumped nearly everyone else. This type of performance continued throughout the quarter, during which he demonstrated over and over again that he was among the best students in the class. I often asked the students to play the roles of the attorneys in the cases we read, re-arguing the facts and the law on behalf of the state and the defendant. Alex exceled in those roles. Almost without fail, he was able to craft arguments and theories that were far more compelling and thoughtful than the points raised by the parties themselves. In addition, I frequently asked the students to defend positions with which they disagreed. This increases the degree of difficulty, as well as replicating one of the most important skills a lawyer (or law clerk) must develop. Here, especially, Alex performed superbly. He could be counted upon to offer insightful and innovative approaches to difficult legal questions, at times when other students might too easily succumb to emotional or ideological tendencies to the contrary. He finished the class by writing an excellent exam and receiving a high grade.

Alex then enrolled in my Patent Law course this past spring, and his work was no less impressive. Patent Law is frequently a difficult subject for students, such as Alex, who have no scientific or technical background. Indeed, many 2Ls have never taken a course that is as enmeshed in complicated federal statutes as patent law. Accordingly, I expect second-year students to struggle to some degree when they enroll. But Alex most certainly did not. From the very first day of class, when I called on him to discuss declaratory judgment practice and its relevance to patent law, he was at the top of his game. He deftly handled multiple cold-calls throughout the year, including a particularly devilish set of questions about the “known or used by others” standard for patent novelty. Moreover, he asked great questions during class, often exploring important areas of doctrine that I had neglected to mention or had described in only cursory fashion. Alex’s success in Patent Law demonstrated two things about him as a student and a legal thinker. First, he was unafraid to dive into new subjects, even topics that were remote from everything else he had previously studied. Second, through hard work and tremendous analytic intelligence, he was capable of learning this new material and analyzing it successfully within a short span of time. Both of these skills will serve him incredibly well as a law clerk.

Alex’s performance in Patent Law exceeded even his impressive work in Criminal Law. He finished the quarter by writing a terrific exam, one of the very best in the class, and earning a high A. The exam was notable in particular for its expert parsing of a complex federal patent statute and the statute’s application to an intricate fact pattern. It was also well-written and a pleasure to read—smooth and concise, with elegant prose and no wasted words. Almost needless to say, that is rare among timed law school exams! On the basis of this exam, I am confident that he is poised to excel in a federal clerkship.

Alex has excelled outside of the classroom as well. He was selected for membership on the University of Chicago Legal Forum (one of our most prominent journals) and holds leadership positions in a number of other student organizations as well. It is no surprise that his fellow students have entrusted him in these roles. He is unfailingly humble, as well as friendly and generous with his time. He is also even-keeled under even the most stressful conditions, never getting too high or too low. He will be well-liked in chambers by everyone who gets to know him.

Alex Newman is a terrific thinker, a talented writer, and a diligent and hard-working student. He has a great legal career in front of him, and in the more immediate term he will be a success in any chambers fortunate enough to hire him. I recommend him strongly.

Sincerely,

Jonathan Masur
John P. Wilson Professor of Law

Alexander Newman
5509 S. Hyde Park Blvd., Apt. 2S, Chicago, IL 60637 • alexnewman@uchicago.edu • 301-787-9669

Writing Sample

The attached writing sample is an excerpt from the initial draft of my comment for my journal, *The University of Chicago Legal Forum*. My comment was selected for publication. This sample is my own work and was not edited by any other person. The sample begins by describing a key Supreme Court decision that discusses police "knock and talks." The sample then analyzes multiple circuit splits concerning the constitutionality of various police practices during knock and talks. The knock and talk is a police technique involving an officer knocking on the door of a home in order to speak with an occupant. Police may perform a knock and talk without obtaining a warrant. To create an eight-page writing sample, I omitted introductory sections as well as proposed rules that resolve the circuit split in a manner consistent with the Supreme Court's knock and talk jurisprudence.

B. The Decision in Jardines

The Supreme Court extensively discussed knock and talks for the first time in Florida v. Jardines.[1] In that case, police brought a drug-sniffing dog to the defendant's home to investigate a suspected marijuana growing operation.[2] The dog went onto the front porch and alerted for drugs.[3] Using this information, the police secured a warrant.[4] The Court held that using a police dog to sniff for drugs within the curtilage of the home is a search under the Fourth Amendment and requires a warrant.[5] Justice Scalia distinguished this behavior from a knock and talk, saying that while a knock and talk was permitted under an implied social license, taking a police dog within the curtilage to search for drugs was not covered by any implied license and required a warrant.[6] The implicit license "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[7] The license is also limited in scope "to a specific purpose . . . the background social norms that invite a visitor to the front door do not invite him there to conduct a search."[8] Since the dog was there to explore around the home and sniff for evidence, this exceeded the scope of the social license.

It is important to note that Justice Scalia's opinion relies upon "the traditional property-based understanding of the Fourth Amendment."[9] Early Fourth Amendment

[1] Florida v. Jardines, 569 U.S. 1 (2013).
[2] Id. at 3–4.
[3] Id.
[4] Id.
[5] Id. at 11–12.
[6] See id. at 8–10.
[7] Jardines, 569 U.S. at 8.
[8] Id. at 9.
[9] Id. at 11.

jurisprudence understood the Amendment as protecting property interests.[10] The English common law case Entick v. Carrington,[11] described by the Supreme Court as "undoubtedly familiar to every American Statesman at the time of the founding," stated that "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave."[12] Applying this axiom, courts considered whether the government had intruded on the defendant's property when analyzing Fourth Amendment issues.

This understanding contrasts with the now common privacy-based understanding of the Fourth Amendment stated in Katz v. United States.[13] Under Katz, courts have looked to whether police have invaded an area where there is a "reasonable expectation of privacy."[14] Katz famously rebuffed a purely property-based interpretation of the Fourth Amendment, with the Court saying "[T]he Fourth Amendment protects people, not places."[15] But the Court in Jardines said it did not need to determine whether there was a reasonable expectation of privacy from a police dog sniffing on the front porch.[16] A Katz analysis was unnecessary because the police had already violated the Fourth Amendment by obtaining information by physically intruding on Jardines's property.[17] A solely property-based analysis was acceptable because "The Katz reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment."[18]

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[10] See, e.g., Olmstead v. United States, 277 U.S 564 (1928) (holding that a wiretap without a warrant was admissible evidence because telephone wires outside of the home are not property protected under the Fourth Amendment), overruled by Katz v. United States, 389 U.S. 347 (1967)).
[11] [1765] 95 Eng. Rep. 807.
[12] Jardines, 569 U.S. at 2.
[13] 389 U.S. 347 (1967).
[14] Id. at 360 (Harlan, J., concurring).
[15] Id. at 351.
[16] Jardines, 569 U.S. at 11.
[17] Id.
[18] Id. (quoting United States v. Jones, 565 U.S. 400, 409 (2012)).

In a concurrence, Justice Kagan suggested that she thought the case could be decided on privacy grounds as well as property grounds.[19] Justice Kagan argued that such an opinion would insist that "privacy expectations are most heightened in the home and the surrounding area."[20] But the concurrence also noted that "the law of property naturally enough influence[s] our shared social expectations of what places should be free from governmental incursions." And as a result, "the sentiment "my home is my own," while originating in property law, now also denotes a common understanding—extending even beyond that law's formal protections—about an especially private sphere."

III. THE CHAOTIC STATE OF CURRENT KNOCK AND TALK JURISPRUDENCE

A. Courts that View Jardines as Limiting the Knock and Talk to the Front Door

The Third Circuit attempted to address the new role of Jardines in Carman v. Carroll,[21] a § 1983 action against police officers who warrantlessly entered Carman's property and went directly to the back door.[22] The Third Circuit used the language of Jardines alongside its own precedent to hold that a knock and talk must begin at the front door.[23] The Third Circuit also determined that the officers were not entitled to qualified immunity, even though the police action in the case had occurred prior to the decision in Jardines.[24] The Supreme Court reversed, holding that the rights at issue were not clearly established at the time of the offense, and so the officers were entitled to qualified

[19] Id. at 13 (Kagan, J., concurring).
[20] Id. (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)) (internal quotation marks omitted).
[21] 749 F.3d 192 (3rd Cir. 2014).
[22] Id. at 197.
[23] Id. at 199.
[24] Id.

immunity.[25] The per curiam decision explicitly declined to state whether a knock and talk must begin at the front door.[26]

The First Circuit also likely views Jardines as restricting police to approaching the front door. In French v. Merrill,[27] police attempted a knock and talk but got no response.[28] As the officers were leaving, one of them noticed a figure at a window, who quickly covered the window and turned out the lights upon being spotted.[29] The police then went back to the front door and knocked again, and after receiving no response, went to the side of the house and knocked on the occupant's bedroom window frame.[30] The First Circuit found that the police officers did not have qualified immunity from a § 1983 claim because their behaviors clearly violated the law that had been established in Jardines.[31] The Court noted that the officers' continued attempts to knock on the door, as well as the knocking at the window, exceeded the customary social license set out in Jardines to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[32]

The Eighth Circuit requires police to knock at a door at the front of the house, and does not allow police to directly proceed to the back of the house.[33] In United States v. Wells,[34] the court considered a case where police proceeded directly into the backyard of a house to investigate reports of a methamphetamine lab being run from a rear building.[35]

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[25] Caroll v. Carman, 574 U.S. 13, 17–20 (2014) ("But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.").
[26] Id. at 20 ("We do not decide today . . . whether a police officer may conduct a "knock and talk" at any entrance that is open to visitors rather than only the front door").
[27] 15 F.4th 116 (1st Cir. 2021).
[28] Id. at 129.
[29] Id.
[30] Id.
[31] Id. at 130.
[32] Id. (quoting Florida v. Jardines, 569 U.S. 1, 8 (2013)).
[33] See United States v. Wells, 648 F.3d 671, 680 (8th Cir. 2011).
[34] Id.
[35] Id. at 673.

Once in the backyard, police conducted a knock and talk at the back door, and when resident answered, police smelled marijuana and discovered drugs.[36] The Eighth Circuit determined that this knock and talk had violated the Fourth Amendment, saying "We are not prepared to extend the "knock-and-talk" rule to situations in which the police forgo the knock at the front door and, without any reason to believe the homeowner will be found there, proceed directly to the backyard."[37]

B. Courts that Expand the Knock and Talk License to Cover the Curtilage Generally

The Fourth and Eleventh Circuits have held that the police may conduct knock and talks beyond the front door of the house, and that the exception even extends to circumstances where the police do not knock on a door.[38]

In United States v. Walker,[39] police officers knocked on the front door of a house, got no response, and left.[40] Later that night, instead of approaching the front door again, the officers went to a carport that was adjacent to a house and knocked on the car's window.[41] The defendant, who was sleeping inside the car, answered to the police and was arrested for evidence the police subsequently found in plain view.[42] The Eleventh Circuit first held that the police had not objectively revealed a purpose to search under Jardines; rather, they had simply approached to speak with the homeowner.[43] Walker found this to be "squarely within the scope of the knock and talk exception."[44] The court also held that knocking on the car window was permitted under the knock and talk exception because it was only a

[36] Id.
[37] Id. at 680.
[38] See Covey v. Assessor of Ohio Cnty., 777 F.3d 186 (4th Cir. 2015); see also United States v. Walker, 799 F.3d 1361 (11th Cir. 2015).
[39] 799 F.3d 1361 (11th Cir. 2015).
[40] Id.
[41] Id. at 1362–63.
[42] Id.
[43] Id. at 1363.
[44] Walker, 799 F.3d at 1363.

"small departure from the front door,"[45] which the Eleventh Circuit considers permissible.[46] To further bolster the argument that police can go beyond the front door, the court quoted an Eighth Circuit opinion that held that "that law enforcement officers must sometimes move away from the front door when attempting to contact the occupants of a residence," though in that case the officer walked around the house in order to serve a defendant with process.[47] The Eleventh Circuit further said it was not unreasonable to conduct a knock and talk at 5:04 a.m. because a light was on in the car.[48]

In the Fourth Circuit's view, "although the knock-and-talk doctrine is sometimes framed as a right to approach the home by the front path or knock on a front door . . . we have made clear that the implicit license is broader than that."[49] In Covey v. Assessor of Ohio Cnty.,[50] officers received a tip that the defendant was growing marijuana behind his home. The officers then arrived at the property, entered the curtilage, and went to the back of the house, where the defendant was, arresting him and collecting evidence. The Fourth Circuit said that if the police had entered the curtilage without having seen the defendant beforehand, they had violated the Fourth Amendment. However, if the officers had seen the defendant from an area outside the curtilage, the knock and talk exception allowed them to approach him. The court then remanded the case for further proceedings. The Covey court reiterated the Fourth Circuit's pre-Jardines precedent that "[a]n officer may also bypass the front door (or another entry point usually used by visitors) when circumstances reasonably indicate that the officer might find the homeowner elsewhere on the property."[51]Thus, an

[45] Id. at 1464.
[46] See United States v. Taylor, 458 F.3d 1201, 1204 (11th Cir. 2006).
[47] Id. (quoting United States v. Raines, 243 F.3d 419, 421 (8th Cir. 2001).
[48] Walker, 799 F.3d at 1364.
[49] United States v. Miller, 809 F. App'x 131, 137 (4th Cir. 2020) (internal quotation marks omitted).
[50] 777 F.3d 186 (4th Cir. 2015).
[51] Id. at 193.

officer can head directly to the backyard of a property without knocking at the front door,[52] or approach residents standing in a driveway.[53]

C. Courts where Police Cannot Remain at the Door after No One Has Answered

Before Jardines, the Sixth Circuit had held that officers could take reasonable steps to attempt to speak with an occupant when "circumstances indicate that someone is home" and the officer's knocking produced no response.[54] But the Sixth Circuit later overturned this precedent after determining that Jardines forbids this practice.[55] Instead, officers cannot "linger on the curtilage once they have exhausted the implied invitation extended to all guests, even if they suspect that someone is inside."[56]

The First Circuit has similarly said that if an occupant has not come to the door, the police cannot persist in attempting additional knock and talks. In French v. Merrill,[57] officers attempted a knock and talk, received no response, left the house, but returned later that night.[58] Despite the officers stating that they thought the occupant did not want to talk, they entered the curtilage to knock on the door again.[59] The First Circuit said that this behavior exceeded the social license necessary for a knock and talk, since "the mere fact that the defendant did not answer the door cannot tip the balance in the officers' favor."[60]

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[52] See Alvarez v. Montgomery Cnty., 147 F.3d 354 (4th Cir. 1998) ("[I]n light of the sign reading "Party In Back" with an arrow pointing toward the backyard, it surely was reasonable for the officers to proceed there directly as part of their effort to speak with the party's host.").
[53] United States v. Miller, 809 F. App'x 131 (4th Cir. 2020).
[54] See Hardesty v. Hamburg Twp., 461 F.3d 646, 654 (6th Cir. 2006).
[55] See Brennan v. Dawson, 752 F. App'x 276, 283 (6th Cir. 2018).
[56] Id. (quoting Morgan v. Fairfield Cnty., Ohio, 903 F.3d 553, 565 (6th Cir. 2018).
[57] 15 F.4th 116 (1st Cir. 2021)
[58] Id. at 128–29.
[59] Id.
[60] Id. at 131 (quoting Hopkins v. Bonvicino, 573 F.3d 752, 765 (9th Cir. 2009).

D. Courts that are Permissive of Officers Remaining on the Curtilage after Receiving No Response

In multiple pre-Jardines case, the Fifth Circuit held that officers must end a knock and talk and pursue different strategies when nobody answers the door.[61] But the Fifth circuit did not limit officers to only knocking at a single door before needing to withdraw, saying that after knocking on the front door and receiving no response, "they might have then knocked on the back door or the door to the back house."[62] However, police were not allowed to use the knock and talk exception to peer through a bedroom window on the side of the house after receiving no response at the front door.[63] Despite these precedents, the Fifth Circuit has rejected a Jardines challenge to a knock and talk where police continued to knock for several minutes with no response after the officers saw people peering through blinds, although this case was brought by a *pro se* defendant who did not fully raise these issues.[64]

In United States v. Carloss,[65] the Tenth Circuit examined a knock and talk that lasted for several minutes.[66] The court declined to set a time limit on how long officers could knock before exceeding the license of a knock and talk.[67] The court found that the officers did not linger on the curtilage for too long, despite knocking for several minutes, because the officers heard movement inside the house, which "encouraged" them to remain at the door, especially because no one inside the house demanded that the officers leave.[68]

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[61] See United States v. Gomez-Moreno, 479 F.3d 350, 356 (5th Cir. 2007); United States v. Troop, 514 F.3d 405, 410 (5th Cir. 2008).
[62] Gomez-Moreno, 479 F.3d at 356.
[63] Troop, 514 F.3d at 411.
[64] See United States v. Flores, 799 F. App'x 282 (5th Cir. 2020).
[65] 818 F.3d 988 (10th Cir. 2016).
[66] Id. at 994.
[67] Id. at 998.
[68] Id. at 998.

Applicant Details

First Name	**Patrick**
Middle Initial	**J**
Last Name	**Nugent**
Citizenship Status	**U. S. Citizen**
Email Address	**nugent2024@lawnet.ucla.edu**
Address	**Address** Street **11140 Rose Ave Apt 107** City **Los Angeles** State/Territory **California** Zip **90034** Country **United States**
Contact Phone Number	**2404000721**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 10, 2024**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Indigenous Peoples' Journal of Law, Culture, and Resistance** **UCLA Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Pace Haub National Environmental Law Moot Court Competition**

UCLA Fall Internal Competition
UCLA Skye Donald Memorial 1L Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Sean, Hecht
shecht@earthjustice.org
213-766-1068

McKenna, Mark
mckenna@law.ucla.edu

Horowitz, Cara
HOROWITZ@law.ucla.edu
(310) 206-4033

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Patrick Nugent (they/them)
11140 Rose Ave Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

June 15, 2023

The Honorable Jamar K. Walker
United States District Court
For the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Re: Judicial Clerkship Application

Dear Judge Walker:

I am a rising third-year law student at UCLA School of Law, and I am writing to apply for a position as a judicial clerk in your chambers for the 2024-2025 term. I chose a career in law because I have always felt a strong calling to public service, and I hope to begin my career by serving the people of Virginia as a judicial clerk in your chambers.

My experiences in both trial and appellate court settings have prepared me to be a strong contributor to your chambers and strengthened my desire to clerk at the district court level. As an extern for Judge David O. Carter last summer, I was able to hone my legal research and writing skills by drafting opinions and orders on myriad unfamiliar areas of law. Judge Carter's clerks gave me significant independence and responsibility, and I loved both the challenge and excitement of crafting a thorough order on a tight deadline. The pace and diversity of that work solidified my desire to clerk at the trial court level and I hope to bring those skills to bear delivering timely, high-quality work in your chambers. This spring semester I also worked with the Hualapai Tribe's Court of Appeals on bench memoranda and draft opinions, gaining further legal writing experience while navigating the nuances and difficulties of tribal court practice.

In addition, I have had the chance to strengthen my writing and organizational skills through journals at UCLA, evaluating legal writing as a Comments Editor on the *UCLA Law Review* and ensuring the accuracy of all citations as Managing Editor of the *Indigenous Peoples' Journal of Law, Culture, and Resistance*. My experience with moot court competitions has also allowed me to hone my writing and oral advocacy abilities. This year, I was very proud to be awarded Best Overall Brief during UCLA's fall internal competition and to be selected as a finalist in the Roscoe Pound Tournament of Champions.

Enclosed please find a copy of my resume, writing sample, and transcript, as well as letters of recommendation from Professors Cara Horowitz, Mark McKenna, and Sean Hecht. Thank you for your time in considering my application, and I look forward to hearing from you.

Sincerely,

Patrick Nugent

Patrick Nugent (they/them)

11140 Rose Avenue Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

EDUCATION

UCLA School of Law, Los Angeles, California
J.D. expected May 2024 | GPA: 3.82 (top 15%)

Honors:	Masin Family Academic Excellence Gold Award – Highest scorer in Torts and Public Natural Resources Law Masin Family Academic Excellence Silver Award – Second highest scorer in Environmental Law and Policy Fall 2022 Internal Moot Court Competition – Best Overall Brief, Best Respondent
Journals:	UCLA Law Review, *Comments Editor* Indigenous Peoples' Journal of Law, Culture, and Resistance, *Managing Editor*
Moot Court:	Roscoe Pound Moot Court Tournament of Champions 2023, *Finalist* National Environmental Law Moot Court Competition, *UCLA Team Member* 1L Skye Donald Moot Court Competition, *Participant, Top 10% finisher*
Pro Bono Research:	HIV Criminalization in Maryland; California Judicial Diversity
Specializations:	David J. Epstein Program in Public Interest Law and Policy Critical Race Studies Specialization | Environmental Law Specialization

Brown University, Providence, Rhode Island
A.B., *with Honors*, Religious Studies, May 2021 | GPA: 3.88

Thesis:	*Jesus, Justice, and Jubilee: The Biblical Foundations of "Liberal" Protestant Anti-Poverty Work*

EXPERIENCE

California Attorney General - Natural Resources Law Section — Los Angeles, California
Legal Intern — Summer 2023

UCLA Tribal Legal Development Clinic — Los Angeles, California/Peach Springs, Arizona
Student Participant — Spring 2023

- Researched and drafted bench memoranda and orders in pending Hualapai Nation Court of Appeals cases
- Conferred with justices to determine the proper resolution of issues of first impression

United States District Court, Central District of California — Santa Ana, California
Judicial Extern to the Honorable David O. Carter — June 2022–August 2022

- Drafted orders on motions to dismiss, summary judgments, reconsiderations, and habeas petitions
- Prepared Judge Carter for oral arguments and drafted questions for parties

El Centro VAWA/UVISA Clinic — Los Angeles, California
Volunteer — Fall 2021–Spring 2022

- Interviewed undocumented survivors of violent crimes in Spanish and translated declarations for USCIS

Tulsa County Public Defender's Office — Tulsa, Oklahoma
Intern — June 2019–August 2019

- Reviewed police reports and cell phone logs for accuracy in pending death-penalty case

Office of Residential Life, Brown University — Providence, Rhode Island
Residential Peer Leader (RA equivalent) — August 2018–March 2020

- Oversaw two upperclassmen dormitories, once in a team and once as the sole RPL for sixty students

Brown University Softball — Providence, Rhode Island
Video Coordinator and *Manager* — February 2018–March 2020

- Travelled with the team and operated live pitch-capture software and camera equipment at all games

LANGUAGES AND INTERESTS

Fluent in Spanish, conversational in Italian, novice in Scottish Gaelic, Duolingo beginner in Irish
Enjoy songwriting, online chess, South American literature, and watching baseball and softball

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name:	NUGENT, PATRICK J
UCLA ID:	905668172
Date of Birth:	03/16/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 07, 2023 | 05:51:32 PM This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021

SCHOOL OF LAW

Major:

LAW

Specializing in CRITICAL RACE STUDIES

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

SAW COMPLETED IN LAW 513, 23S

Previous Degrees

None Reported

California Residence Status

Resident

Fall Semester 2021

Major:
LAW

CONTRACTS	LAW 100	4.0	13.2	B+
INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
Multiple Term - In Progress				
TORTS	LAW 140	4.0	16.0	A
CIVIL PROCEDURE	LAW 145	4.0	17.2	A+

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	46.4	3.867

Spring Semester 2022

LGL RSRCH & WRITING	LAW 108B	5.0	18.5	A-
End of Multiple Term Course				
CRIMINAL LAW	LAW 120	4.0	14.8	A-
PROPERTY	LAW 130	4.0	14.8	A-
CONSTITUT LAW I	LAW 148	4.0	14.8	A-
ENVIRONMNTL JUSTICE	LAW 165	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	62.9	3.700

Fall Semester 2022

FEDERAL INDIAN LAW	LAW 267	3.0	9.9	B+
PUB NATURAL RESOURC	LAW 293	4.0	17.2	A+
ART&CULTURL PROP LW	LAW 301	3.0	0.0	P
PROB SOLV PUB INT	LAW 541	3.0	12.0	A
GEOGRPHICL INDICATN	LAW 561A	0.5	0.0	IP
Multiple Term - In Progress				
CLIMATE CHANGE	LAW 591	3.0	12.0	A

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	51.1	3.931

Spring Semester 2023

CRITCL RACE THEORY	LAW 266	4.0	13.2	B+
ENVIRONMENTAL LAW	LAW 290	4.0	16.0	A
JOURNAL LEADERSHIP	LAW 347	1.0	0.0	P
CALIF ENVIRNMNTL LW	LAW 513	3.0	12.0	A
GEOGRPHICL INDICATN	LAW 561B	1.0	0.0	P
End of Multiple Term Course				
TRIBAL LEGAL DEV	LAW 728	4.0	16.0	A

	Atm	Psd	Pts	GPA
Term Total	17.0	17.0	57.2	3.813

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	7.0	7.0	N/a	N/a
Graded Total	57.0	57.0	N/a	N/a
Cumulative Total	64.0	64.0	217.6	3.818

Total Completed Units 64.0

Memorandum

Masin Family Academic Gold Award
TORTS, s. 7, 21F
RESIDENCE ESTABLISHED 8/10/2022
Masin Family Academic Gold Award
PUB NATURAL RESOURC, s. 1, 22F
Masin Family Academic Silver Award
ENVIRONMENTAL LAW, s. 1, 23S

END OF RECORD
NO ENTRIES BELOW THIS LINE

Sean B. Hecht
Managing Attorney, California Regional Office

February 28, 2023

Dear Judge:

I write to recommend Patrick Nugent for a clerkship in your chambers. As the former co-director of UCLA School of Law's environmental law program and a member of the faculty for 20 years until last month, I got to know Patrick through Patrick's abiding interest in justice, law, and environmental issues, and through teaching them. In addition to counseling Patrick in my role as advisor and mentor to our students interested in environmental law, I taught Patrick in my Public Natural Resources Law course in the Fall of 2022. Patrick is intelligent, thoughtful, and diligent, and is among the most motivated, mature, and talented students I have had the pleasure to teach and supervise. In my experience, Patrick is extraordinarily intelligent, thoughtful, and diligent. As a former federal district court law clerk myself (Hon. Laughlin E. Waters, C.D.CA in 1995) I consider myself to have a strong sense of what qualities a federal law clerk needs to have. I believe Patrick will excel as a lawyer, and that in the shorter term they will make a terrific judicial law clerk. I give Patrick my highest recommendation.

Patrick excels at legal analysis (as evidenced by their stellar law school grades), and is detail-oriented and thorough. Patrick impressed me from the first days of class as an unusually bright and hard-working student. I rely on student participation in my course, and call on volunteers as well as on non-volunteers. Patrick was always prepared and always had something intelligent to say. Although they are not the type of student to dominate class discussions or to show off, Patrick often volunteered to answer questions or to comment on issues I raised in the class session. Patrick's comments were invariably legally and technically accurate, responsive to the points being discussed, and reflective of a high level of both preparation and skilled analysis. Patrick's comments reflected the intellect to cut to the heart of a legal issue as well as the ability to understand the complexities of both the legal and policy issues with which lawyers grapple. Patrick's significant success in moot court also reflects this skill set, along with careful preparation and the ability to anticipate and respond in real time to challenging questions.

I have also enjoyed getting to know Patrick. I think Patrick would be a terrific colleague. Patrick is easy to work with and is always well-prepared and personable in a low-key way, and this shows through in the way they work with fellow students. I think Patrick's follow-through, good judgment, and people skills will be great assets as a law clerk and lawyer.

Patrick also received the very top grade on my blind-graded final examination in Public Natural Resources Law, earning the highest grade in the course. The test covered a wide variety of topics, and required answers demonstrating sophistication in both knowledge of

CALIFORNIA OFFICE 707 WILSHIRE BLVD., SUITE 4300 LOS ANGELES, CA 90017

T: 213.766.1059 F: 213.403.4822 CAOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

legal doctrine and ability to understand policy trade-offs. Patrick's examination answers were thoughtful, well-written, and cut to the heart of the issues in precisely the way I had intended. After I completed grading and Patrick asked me to write this recommendation, I reviewed Patrick's resume and transcript for the first time, and was pleased—though not at all surprised—to see how stellar their overall academic performance was.

In sum, I am convinced that Patrick has the intellectual ability, the work habits, the character, and the motivation to be a top-quality law clerk and attorney. Patrick will be an asset to your chambers. Please feel free to contact me at shecht@earthjustice.org or my direct phone line (213) 766-1068 to discuss Patrick further.

Sincerely,

Sean B. Hecht

UCLA School of Law

MARK MCKENNA
PROFESSOR OF LAW
FACULTY CO-DIRECTOR, UCLA INSTITUTE FOR TECHNOLOGY, LAW & POLICY

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 267-4117
Email: mckenna@law.ucla.edu

June 7, 2023

Re: Letter of Recommendation for Patrick Nugent

Dear Judge:

This letter is to recommend Patrick Nugent for a clerkship position in your chambers. Based on my experience with Patrick, I am certain that they will be an excellent law clerk and ultimately an outstanding lawyer. I recommend them in the strongest terms.

I first became acquainted with Patrick when they were a student in my Torts class during the fall semester of 2021. Patrick was a regular and thoughtful participant in class discussions – not only when I called on them, but also on many occasions when they volunteered and responded their classmates' comments. Patrick routinely asked questions that went to the heart of an issue and probed the purposes of the legal rules, often with the goal of connecting various topics in the class. It was very clear that his classmates saw Patrick an intellectual leader in the class. When the class got stuck on something, they often were eager to hear what Patrick thought, and they took Patrick's comments seriously in formulating their own responses.

Unsurprisingly, Patrick did very well on the final exam, earning the highest grade in strong class. In recognition of Patrick's achievement, they the Academic Excellence Gold Award for the class (given to the student with the highest grade in a curved class). Patrick's overall performance so far in law school (a cumulative GPA of 3.818) has been equally strong. While UCLA does not formally rank students, I can tell you that UCLA adheres to a grading policy that strictly limits the number of A/A+ grades that can be given in any particular course. Specifically, faculty members cannot give A or A+ grades to more than 20% of students in any first year or large upper-division course. (Here I will note that it is remarkable that Patrick has earned A+ grades in two courses. While faculty differ in their willingness to give A+ grades, I understand them to be pretty rare. I have never given a student an A+ in 20 years of teaching.) I have no doubt that Patrick's academic performance will continue the rest of their law school career.

Given Patrick's outstanding performance in my Torts class, I was delighted when they and several of their classmates registered for a small seminar that I am co-teaching over the course of this academic year. Ours is one of UCLA's Perspectives courses—courses that focus primarily on a range of perspectives

on law rather than on specific doctrinal rules. These seminars meet semi-regularly over the course of the year, and they are discussion heavy. Our class focuses on geographical indications as a way of talking about the role of place and culture in legal traditions. Here too, Patrick has been an extremely thoughtful and regular participant. Patrick has continued to play the role of intellectual leader, even while making sure to leave plenty of room for his classmates' interventions.

As you can see from Patrick's resume, they are very interested in public interest lawyering, and Patrick has already demonstrated a commitment to working in areas they are passionate about. In Patrick's first year and a half in law school, they have already volunteered with the El Centro VAWA/UVISA Clinic and participated in the UCLA Tribal Legal Development Clinic. Prior to coming to law school, Patrick interned at the Tulsa County Public Defender's Office. I know from our conversations that public interest work will always be a priority for Patrick, whether that is in a full-time position or an active pro bono practice. Patrick wants a strong clerkship opportunity in part so that they can continue to use their legal skills to the benefit of others.

I should also say that, on a personal note, I am confident that you would really enjoy working with Patrick. They are super smart, but also humble and very well-rounded. Those traits will serve Patrick well as a clerk and as a lawyer. I strongly recommend them. If you have any questions, please do not hesitate to contact me at (310) 267-4117 or at mckenna@law.ucla.edu.

Sincerely,

Mark McKenna
Faculty Co-Director, UCLA Institute of Technology, Law & Policy

UNIVERSITY OF CALIFORNIA, LOS ANGELES **UCLA**

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

Cara Horowitz
Andrew Sabin Family Foundation Co-Executive Director
Emmett Institute on Climate Change and the Environment

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-4033
Email: horowitz@law.ucla.edu

February 28, 2023

To whom it may concern:

It is my great pleasure to give Patrick Nugent my strongest recommendation for a judicial clerkship. Patrick is a gifted researcher, writer, and legal thinker. In addition, Patrick is collaborative, unafraid of complexity, and a hard worker. They would be an asset to any chambers.

Patrick was a student in my climate law and policy seminar, an advanced discussion course that covers a broad swath of U.S. and international law and policy approaches to the problem of climate change. Their contributions in class demonstrated a strong grasp of the material and a genuine interest in engaging with new ideas and understanding complex issues. Patrick wrote three short papers for the class, including an especially strong one on potential litigation approaches to addressing the problem of "greenwashing," by which corporations deceive consumers through advertising that unduly bolsters eco credentials. Patrick's research and writing were outstanding; they were among the very strongest students in the class and received an "A". I am not at all surprised to learn that Patrick earned the highest grade in not one but two of their large, curved lecture classes.

Patrick has also contributed significantly to the law school community. They serve as an editor of two journals, including the UCLA Law Review, and also regularly participate in moot court competitions. ("Participate in" undersells Patrick's contributions, actually; I understand that they won Best Overall Brief and Best Respondent in our UCLA moot court competition.) They have volunteered to assist undocumented crime victims and to advance research into HIV criminalization.

I also want to say a word about Patrick's empathy and collegiality. I supervised Patrick and a classmate in a national moot court environmental competition earlier this year, for which Patrick and the teammate submitted an excellent brief. However, a couple of weeks before the team could participate in the oral argument portion of the competition, Patrick's teammate had to pull out for personal reasons, leaving Patrick no choice but also to withdraw. It was undoubtedly a disappointment to Patrick, who had worked hard to prepare and who would, I suspect, have done extremely well in the oral advocacy rounds. I know Patrick had been looking forward to the oral advocacy. But Patrick showed nothing but immediate support and understanding of the teammate's decision, easing (I'm sure) the teammate's considerable stress that week.

This is typical of my experiences with Patrick, who has shown maturity, generosity, and good grace in every interaction we've had. As we all know, such characteristics do not always come hand in hand with top-notch legal acumen; here, they do.

For all of these reasons, I give Patrick my highest recommendation. Please feel free to contact me if any additional information might be useful.

Sincerely,

Cara A. Horowitz

Patrick Nugent (they/them)
11140 Rose Avenue Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

I prepared the following brief for UCLA School of Law's Fall Internal Moot Court Competition. The competition consisted of a closed-universe problem regarding gender-based affirmative action policies and the free speech protections afforded to professors at public universities. The questions presented were:

1. Whether Respondent's admissions policy, which gives preferential weight to male applicants, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?
2. Whether Respondent violated Petitioner's right to freedom of expression under the First Amendment to the United States Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment?

The competition assigned me to represent the Respondent, Westsylvania State University, and the following brief represents entirely my own work with no outside feedback or edits. At the close of the competition, my submission was awarded Best Overall Brief.

Introduction

After being rejected from the only medical school to which she applied—Westsylvania State University ("WSU")—Stephanie Jones used WSU's own resources to wage a crusade against the school's policies on the belief that she was unfairly denied admission. Jones leveraged her position as a WSU employee to create a hostile classroom environment and deliver remarks disparaging the school, its students, and its employees, leading to her termination. Now, she would have this Court vindicate her behavior by finding that the school's affirmative action policy violates the Constitution's guarantee of equal protection and that her termination infringed her right to free speech under the First Amendment. Both claims must fail.

First, WSU's admissions policies do not violate the Equal Protection Clause of the Fourteenth Amendment under any level of scrutiny. WSU has a compelling interest in fostering many kinds of student body diversity to enhance educational outcomes. Its admissions policies—which consider gender among myriad other factors—are narrowly tailored to further that interest. Jones completely ignores the holistic nature of WSU's admissions process and asks this court to single out the small piece of her application that gender represented. Second, the speech that prompted her termination was the culmination of Jones repeatedly leveraging her faculty position to inappropriately rail against WSU's administration. Because Jones' speech owed its existence to her work at WSU and grew out of her personal grievance with the school, it was not protected by the First Amendment and WSU was within its rights as an employer to fire her.

Statement of the Case

WSU is a prestigious, flagship university with extremely competitive admissions across all programs. R at 3. WSU's medical school is a tier one school—ranked in the top fifty programs nationwide and best in its region—and most in-state applicants consider admission to

WSU Medical School unlikely. R at 3. The Medical School weighs many factors beyond academic prowess in building its incoming class, recognizing that it cannot accommodate every accomplished applicant and that a diverse and varied student body benefits those who are admitted. R at 3-6. WSU believes that diversity will "enhance the educational experience" and "help to break down stereotypes," while homogeneity can hurt the prestige, ranking, and popularity of the school. R at 4-5. Accordingly, "good grades do not guarantee anyone a spot" at WSU, which combines passion, extracurriculars, legacy status, recommendations, and a mix of "Personal Ratings" and "Plus Factors" in making admissions decisions. R at 3, 6-7.

Personal Ratings factor in written materials, faculty assessments, and interviews to assess candidate personality, while Plus Factors comprise various intangibles and "other factors." R at 6-7. While gender is one possible "other factor," WSU also values candidates' legacy status and diversity in geography, income, and area of study. R at 7. Candidates also earn extra points for applying by WSU's priority deadline. R at 6. Such holistic evaluation allows WSU to achieve a "critical mass" of students with various unique characteristics in the incoming class. R at 7.

Before implementing any affirmative action policy, however, the school first attempted unsuccessfully to bolster gender diversity through other means. R at 5. WSU increased its recruiting budget to target male applicants, created scholarships for men who contribute to other types of diversity, and increased in-person and virtual outreach targeting male audiences. R at 5. Only after these efforts failed to achieve the desired gender balance for nearly a decade did WSU begin considering gender as an "other factor" to "increase overall diversity." R at 5, 7.

Stephanie Jones is a Westsylvania native from an affluent family who has a background in science and medicine. R at 6. In 2019, she applied solely to WSU more than two months after the priority deadline. R at 6. Jones' application was originally incomplete because she failed to

include a required transcript, and her file was completed less than a week before WSU closed applications. R at 6. Her MCAT score was only slightly above the national median and all female admits to WSU met or exceeded her credentials. R at 6. WSU denied Jones admission, stating that gender was "not decisive" in its decision. R at 6-7. Nearly four years later, Jones sued claiming that WSU's admissions program unfairly discriminates based on gender. R at 10.

After it denied her admission, WSU hired Jones as a part-time lecturer in its undergraduate Women's, Gender, and Sexuality Studies department, teaching two courses. R at 8. Jones was highly involved outside the classroom, advising student groups and using university funds to travel to conferences, conduct research, and publish papers. R at 8. In the classroom, Jones consistently fixated on WSU Medical School's affirmative action procedures, using her position as a lecturer to air her grievances with the policy. R at 8-10. Jones forced male students to defend WSU's policy and chastised female students who she felt did not oppose the policy forcefully enough. R at 8. She referred to students by chromosomes, ironically calling male students "XX-havers" and claiming they did not "buck the affirmative action stereotype" if she found their answers unsatisfactory. R at 8. Jones also openly clashed with one student, who felt that Jones created a "hostile environment" in the classroom, and her student reviews were below WSU's average in fall 2021. R at 8-9.

WSU's Dean of Diversity, Inclusion, and Equity ("DIE") agreed that Jones created a hostile environment and demanded she stop referring to students with chromosomal pairs or commenting on the affirmative action policy. R at 9. Despite the DIE Dean alerting Jones that she would face discipline—up to and including termination—if she continued her inflammatory behavior, Jones refused to comply with his requests. R at 9. At first, she agreed to stop using chromosomal language if she could continue discussing affirmative action in class but returned

to using "XX" and "XY" in class within two weeks. R at 9. Upon learning this, the DIE Dean demanded Jones cease using chromosomal language or discussing affirmative action. R at 9.

At that point, Jones began leveraging other aspects of her position to share her views on the affirmative action policy, becoming even more outspoken in office hours and at student meetings. R at 9. At a faculty lunch, she called a colleague an "affirmative action baby." R at 9. Jones also presented papers on affirmative action at conferences sponsored or funded by WSU, specifically criticizing WSU male faculty members for maintaining the policy. R at 9.

Jones' vocal disagreement with the affirmative action policy finally came to a head at a rally held on WSU's campus, where Jones delivered a slam poem criticizing affirmative action for men. R at 10. Though the student who introduced Jones did not mention her position, Jones identified herself as WSU faculty and "a victim of the corrupt system in society." R at 10. Jones' slam poem went viral on multiple platforms and led to a net decrease in WSU's donation funding. R at 10. On the advice of the DIE Dean and WSU's president, Jones was fired. R at 10.

The District Court granted summary judgment to WSU on both claims and the Fourteenth Circuit affirmed. R at 10-11, 16.

Argument

1. Gender-Based Policies Trigger Intermediate Scrutiny, but WSU's Affirmative Action Policy is Constitutionally Permissible Under Any Standard of Review

For decades, intermediate scrutiny has been the proper standard for considering policies that differentiate based on gender.[1] Such policies need only be "substantially related to . . . an important governmental interest" to pass constitutional muster. *Kirchberg*, 450 U.S. at 459. However, even accepting dissenting Judge Shiner-Briggs' invitation to ignore longstanding

[1] To cite only a few cases, this Court reached that conclusion in *U.S. v. Virginia*, 518 U.S. 515, 533 (1996), *Nguyen v. INS*, 533 U.S. 53, 60-61 (2001), *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981), and *Michael M. v. Superior Ct.*, 450 U.S. 464, 468-69 (1981) (plurality finding that gender classifications are not "inherently suspect" and strict scrutiny should not apply to them).

precedent, R at 16, WSU's policy also survives strict scrutiny. Strict scrutiny requires a policy be "narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). WSU's desire for diversity and holistic review process satisfy this test.

a. WSU's Interest in Diversity Is Compelling Because it Enhances Educational Experiences, Fosters Understanding, and Helps Maintain WSU's Prestige

Fostering student body diversity is not only an important governmental interest but a compelling one, and WSU's interest here is no different. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell found diversity to be a compelling interest for universities and deserving of judicial deference. The Court later confirmed that decision in *Grutter*. *Grutter*, 539 U.S. at 325. Further refining the requirement in *Fisher v. University of Texas at Austin*, 579 U.S. 365, 381-82 (2016), the Court clarified that diversity alone is not an automatically compelling interest, but rather must be directly tied to tangible university goals. The goals in *Fisher* included destroying stereotypes, increasing cross-racial understanding, and creating a "robust exchange of ideas." *Id.* The Court found these interests compelling and deferred to the University's judgment even under strict scrutiny. *Id.*

Here, WSU's medical school admissions team articulated nearly identical goals for their own diversity efforts. WSU believes that a "critical mass" of male students can "enhance the educational experience, create cross-gender understanding and help to break down stereotypes" while a lack of gender diversity will hurt the school's prestige and reputation. WSU believes that students consider gender diversity "crucial" and that schools with skewed gender ratios see their public perceptions suffer. A top university like WSU, whose medical school is consistently its region's best, has a compelling interest in maintaining diverse classes to offer the best education possible. Thus, WSU has not only identified the important interest required for gender-based policies but exceeded that requirement by identifying a compelling interest in diversity.

b. WSU's Affirmative Action Policy Is Narrowly Tailored to Achieve Diversity Because Gender Is a Small Factor, WSU Disclaims Quotas, and Gender-Neutral Efforts Previously Failed to Achieve the Diversity Sought by WSU

Analyzing WSU's policy shows that it is not only substantially related to enrolling a diverse student body, but narrowly tailored to achieve the critical mass of diversity that WSU seeks. The university first pursued gender-neutral means of increasing diversity, then created a policy that weighs gender among many other factors, all while disclaiming quotas. As in *Grutter* and *Fisher*, WSU's narrowly tailored policy survives even the most exacting scrutiny.

In *Grutter*, the Court upheld the policy at issue because it did not institute quotas—as the policy in *Bakke* had—and maintained an individualized, flexible, and holistic review of applicants even while considering race as a "plus" factor. *Grutter*, 539 U.S. at 335-37. Additionally, the plan in *Grutter* was upheld because it gave "substantial weight to diversity factors besides race" and the school engaged in good faith consideration of race-neutral efforts before implementing its policy. *Id.* at 338-40. Then, in *Fisher*, the Court further noted that past failed efforts to increase diversity through race-neutral policies like establishing scholarships, bolstering recruitment budgets, and hosting recruiting events showed that race-neutral alternatives could not adequately further the university's interest. *Fisher*, 579 U.S. at 385.

Here, WSU has similarly narrowly tailored its affirmative action to foster diversity. The Medical School first attempted to increase gender diversity without instituting an affirmative action policy. WSU increased its recruitment budget to target male applicants with emails and visits, created scholarships for men who furthered other diversity categories, and used social media to reach out to potential male applicants. Only after eight years, when these attempts had not achieved the desired diversity, did WSU institute its affirmative action policies.

When it did implement that policy, however, gender remained one among many factors considered and WSU never implemented quotas for male students. Gender is only one potential "other factor" in the "Plus Factors" aspect of applications, along with geography, socioeconomic hardship, legacy status, and more. Separate from "Plus Factors," WSU considers academic markers, "personal ratings," recommendations, and timing of applications. Thus, WSU instituted the same type of individualized, flexible review seen in *Grutter*, viewing applicants holistically even as it noted gender as a potential plus factor. WSU also "disclaims quotas," and while the admissions office set numerical goals related to male enrollees, it has never met them, implying that admission is not a simple matter of gender ratios. Accordingly, WSU's policy, which was designed only after gender-neutral policies failed, is narrowly tailored to ensure that gender is one factor within its individualized and holistic process that eschews quotas. It therefore far exceeds the substantially related requirement normally placed on gender-based initiatives and is permissible under *any* level of equal protection analysis.

For Jones, nearly every piece of the admissions puzzle cut against her. She is from a well-to-do family in Westsylvania, has a typical prior education in biology and medicine, and sent an incomplete application past the priority deadline. Her MCAT score was only a few points above average, and every female admit to WSU either met or exceeded her academic credentials. Thus, WSU's statement that gender was "not decisive" in denying Jones is hard to disbelieve and should lead this Court to find for WSU.

2. Jones' Termination Did Not Infringe Her First Amendment Rights Because Her Speech Was Pursuant to Her Official Duties and Not on a Matter of Public Concern

Not satisfied with simply pressing her claim for gender discrimination several years removed from her admission denial, Jones also claims that the university's decision to terminate her violated her First Amendment rights. Her claim fails at every step. Public employees are

entitled to First Amendment protections only if they are "speaking as citizens about matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). If, instead, their speech comes "as an employee upon matters only of personal interest," First Amendment protections are limited and federal courts defer to personnel decisions made by the government as they would to any other employer. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

Applying this framework, Jones' speech was entitled to no protection. First, by correctly applying *Garcetti* to university professors as public employees, this Court must find that Jones' speech owed its existence to her employment and is not entitled to protection. Second, even if *Garcetti* does not apply, Jones' speech was a mere extension of her personal complaint with the University and did not touch a matter of public concern. As such, under *Connick*, her speech was not protected when WSU justifiably exercised its discretion as an employer and fired her.

a. Jones' Speech Owed its Existence to Her Position at WSU and Was Unprotected

The speech leading to Jones' termination owed its existence directly to her position as a faculty member at WSU. It occurred in the classroom, during office hours, while serving as a faculty advisor, at conferences funded by WSU, in conversations with other faculty, and, finally, at an event on WSU's campus where Jones introduced herself as a WSU employee. As such, under *Garcetti*, Jones' speech was clearly "pursuant to [her] official duties," and is entitled to no protection under the First Amendment. *Garcetti*, 547 U.S. at 421.

In *Garcetti*, the Court established that, as a threshold matter, speech by a public employee is not protected if it occurs "pursuant to their official duties." *Id.* Looking past official job descriptions, which are often unhelpful in delineating an employee's actual duties, the Court instead allowed restrictions on "speech that owes its existence to a public employee's professional responsibilities." *Id.* at 421, 424-25. Because the speech at issue in *Garcetti* was a